

(25,956)

20792  
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 504.

J. KNOX GREER, PETITIONER,

*vs.*

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print
Caption.....	<i>a</i>	1
Transcript of record from the District Court of the United States for the Eastern District of Oklahoma.....	1	1
Indictment.....	1	2
Arraignment and plea.....	2	3
Record of trial.....	2	3
Judgment and sentence.....	3	3
Bill of exceptions.....	4	4
Testimony of J. A. Johnson.....	5	5
E. L. Pegg.....	10	11
Bob Duncan.....	12	14
T. E. Brents.....	16	17
Plaintiff rests.....	18	19
Defendant's demurrer to the evidence.....	18	19
Order overruling defendant's demurrer.....	18	19
Testimony of J. Knox Greer.....	18	19
Defendant rests.....	30	32
Testimony of L. W. Barker.....	30	33
Testimony of T. E. Brents (recalled).....	31	33

Defendant's Exhibit A—Plat showing railroad connection at Tupelo, Oklahoma.....	33	35
Defendant's motion for a directed verdict.....	34	35
Order overruling motion for a directed verdict.....	34	35
Instructions of the court.....	34	35
Instructions requested by the defendant.....	38	38
Acceptance of service of a copy of the bill of exceptions by the United States attorney.....	39	40
Order settling bill of exceptions.....	40	40
Petition for writ of error.....	40	40
Assignment of errors.....	41	41
Order allowing writ of error.....	45	45
Writ of error.....	46	45
Return to writ.....	47	46
Citation, with acknowledgment of service.....	47	46
Notice and agreement as to contents of printed record....	47	47
Certificate of clerk.....	49	48
Appearance for plaintiff in error.....	50	48
Order of submission.....	50	49
Opinion, Smith, J.....	51	49
Judgment.....	58	54
Clerk's certificate.....	59	54
Writ of certiorari and return.....	60	55

*a* Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1916, of said Court, Before the Honorable William C. Hook and the Honorable Walter I. Smith, Circuit Judges, and the Honorable Charles F. Amidon, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,

*Clerk of the United States Circuit Court  
of Appeals for the Eighth Circuit.*

Be it remembered that heretofore, to-wit: on the twelfth day of June, A. D. 1916, a transcript of record pursuant to a writ of error directed to the District Court of the United States for the Eastern District of Oklahoma, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein J. Knox Greer was Plaintiff in Error and United States of America was Defendant in Error, which said transcript as prepared, printed and certified by the Clerk of said District Court in pursuance of an Act of Congress approved February 13, 1911, is in the words and figures following, to-wit:

1 In the United States District Court for the Eastern District of Oklahoma.

Pleas and proceedings before the Honorable Ralph E. Campbell, Judge of the District Court of the United States for the Eastern District of Oklahoma, presiding in the following entitled cause:

Criminal.

2055.

UNITED STATES OF AMERICA, Plaintiff,

vs.

J. KNOX GREER, Defendant.

J. KNOX GREER, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Be it remembered, that at the November 1915 term of the above styled court, on the 12th day of November, A. D. 1915, the grand jurors of the United States of America, duly impaneled, sworn and

charged, returned into court an indictment No. 2055, against J. Knox Greer for Introducing Liquor, which indictment is in words and figures as follows to-wit:

United States District Court, Eastern District of Oklahoma.

No. 2055.

THE UNITED STATES OF AMERICA

v.

J. KNOX GREER.

*Indictment—Introducing Liquor.*

UNITED STATES OF AMERICA,  
*Eastern District of Oklahoma:*

In the District Court of the United States in and for the Eastern District of Oklahoma, at the November Term Thereof, A. D. 1915, at Chickasha.

2        The Grand Jurors of the United States of America, duly impaneled, sworn and charged, at the term aforesaid of the court aforesaid, to inquire into and due presentment make of offenses against the said United States, on their oath do find, present and charge that one J. Knox Greer on the 30th day of August A. D. 1915 in the County of Pontotoc, State of Oklahoma, in the said district and within the jurisdiction of said court, did at the time and place aforesaid, unlawfully, knowingly, wilfully and feloniously introduce and carry into the county and district aforesaid, from without the said State of Oklahoma, one quart of vinous, malt, fermented and intoxicating liquor, to-wit: Whiskey; the portion of said county and district into which the said liquor was so introduced having been within the limits of the Indian Territory and a part thereof, prior to the admission of the said State of Oklahoma into the Union as one of the United States of America.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

GEO. MILLER, JR.,

*Assistant United States Attorney*

A true Bill.

G. C. STEBBINS, *Foreman.*

Endorsed: No. 2055. United States District Court, Eastern District of Oklahoma, — Division. The United States of America vs. J. Knox Greer. Indictment—Introducing Liquor. A true bill, G. C. Stebbins, Foreman. Filed in Open Court in the Presence of the Grand Jury Nov. 12, 1915. R. P. Harrison, Clerk U. S. District Court. Witnesses: Thomas E. Brents, Ada; J. A. Johnson, Muskogee.

And thereafterwards, to-wit, on the 7th day of March, A. D. 1916, the same being one of the days of the regular Vinita 1916 term of the United States District Court for the Eastern District of Oklahoma, court met pursuant to adjournment at Vinita, Oklahoma. Present and presiding the Honorable Ralph E. Campbell, Judge.

Among the proceedings had on this day is the following:

Criminal.

No. 2055.

UNITED STATES

v.

J. KNOX GREER.

Introducing Liquor.

*Arraignment and Plea and Record of Trial.*

Now comes the United States by the United States Attorney, and comes the defendant, J. Knox Greer, in person, and by  
3 Denton & Lee, his attorneys, and this cause coming on for trial the following jurors are called by the clerk and sworn to answer questions touching their competency to serve as jurors upon the trial of this cause, and are examined, found qualified, accepted by the parties, and sworn to try the issues joined herein.

J. O. Abney, D. B. Ogden, Watt Phillips, B. H. Frick, D. D. Wertzberger, Wm. Pennington, J. W. Hardin, Alex Clement, C. G. Kinyan, Otis Coffey, E. E. Chivers, W. W. Jeter.

And the trial of this cause proceeds. And on motion of the United States Attorney it is ordered that the said defendant be arraigned upon the indictment herein. And thereupon the said defendant waives arraignment and says for his plea that he is not guilty of the charges as contained in the said indictment.

And the jury, after hearing all the evidence introduced, the arguments of counsel, and the instructions of the court, retires in charge of a sworn bailiff to consider of its verdict, and afterward return into court with its verdict, which is as follows, to-wit:

We, the jury in the above entitled cause, duly empaneled and sworn, upon our oaths, find the defendant, J. Knox Greer, guilty as charged in the indictment.

OTIS COFFEY, *Foreman.*

*Judgment and Sentence.*

Now comes the United States by the United States Attorney, and comes the defendant J. Knox Greer in person, and by Denton & Lee, his attorneys, and the United States Attorney asks the judg-

ment and sentence of the Court upon the verdict of guilty returned into court by the jury herein. And it being demanded of the said defendant what he has to or can say why the sentence of the law shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen, and by the Court well and sufficiently understood, it is now by the court here considered, ordered and adjudged, that the said defendant J. Knox Greer, for his crime aforesaid, be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the term and period of Two years, and that he make his fine unto the United States in the sum of \$250, and that he stand committed until said fine  
4 is paid. It is further ordered that the costs of this case be remitted.

It is further ordered that the Marshal of this Court, into whose custody the said defendant is now here committed, receive and safely keep and convey the body of the said defendant hence to said Penitentiary without delay, and deliver him to the keeper of said Penitentiary, in execution of the sentence aforesaid, and in conformity with the same, for the full period of time aforesaid.

It is further ordered that the Clerk of this Court shall furnish the Marshal of this Court with a duly certified order of commitment in this cause, and a duplicate of the same, one of which shall be delivered to the keeper of said Penitentiary, and the other returned by the Marshal to this Court, with a full and true account of the execution of the same.

Now comes the United States by the United States Attorney, and comes the defendant, J. Knox Greer, in person, and by Denton & Lee, his attorneys, and the said defendant excepts to the judgment and sentence of the court entered herein, and asks and is allowed sixty days in which to prepare and serve upon the United States Attorney his bill of exceptions herein, and five days thereafter is given the United States Attorney in which to suggest amendments, the same to be settled and filed upon three days' notice thereafter.

It is further ordered that supersedeas bond for the said defendant is fixed at the sum of \$5000.00.

And, thereafterwards, to-wit, on the 6th day of May, A. D. 1916, the defendant filed his Bill of Exceptions herein, which is in words and figures as follows:

#### *Bill of Exceptions.*

Now on this 7th day of March, A. D. 1916, came on for trial the above entitled and numbered cause, before the Honorable Ralph E. Campbell, Judge, presiding and a jury; and thereupon appeared on behalf of the United States, D. H. Linebaugh, Esq., United States Attorney; and appeared the defendant in person and by his at-

torney, James C. Denton, Esq., and Frank Lee, Esq.; and the parties having announced ready for trial, the jury is examined on voir dire, selected, and accepted, and statements are made on behalf of the respective parties. Whereupon, evidence herein is introduced as follows:

On Behalf of the United States.

J. A. JOHNSON, being first duly sworn, upon oath testified as follows:

Direct examination.

By Mr. Linebaugh:

Q. You may state your name.

A. J. A. Johnson.

Q. Where do you live, Mr. Johnson?

A. Muskogee, Okla.

Q. In what business are you engaged?

A. Railroad.

Q. For what railroad are you employed?

A. M., O. & G.

Q. In what capacity?

A. Conductor.

Q. Conductor of a passenger train?

A. Yes, sir.

Q. Were you a conductor—passenger conductor for the M., O. & G. railroad on August 30th, 1915?

A. I was.

Q. Mr. Johnson, do you know the defendant, J. Knox Greer?

A. I do.

Q. What was your run on August 30th, 1915?

A. From Denison to Muskogee.

Q. From Denison, Texas, to Muskogee, Oklahoma?

A. Yes, sir.

Q. How far is it from Denison, Texas, to the Oklahoma line, along the line of your railroad?

A. Eight miles.

Q. How far is it then from Denison, Texas, to Allen, Oklahoma?

A. Ninety-six.

Q. Mr. Johnson, on or about the 30th of August, 1915, do you recall the defendant getting aboard your train at Denison, Texas, ticketed to Allen, Oklahoma?

A. Yes, sir.

Q. When he got aboard your train, did he have any baggage?

A. A couple of grips.

Q. Were they grips or suitcases?

A. Well, they were suitcases.

Q. Suitcases?

A. Yes, sir.

Q. He got on the train at Denison, Texas, did he?

A. Yes, sir.

Q. With those two suitcases?

A. Yes, sir.

Q. Did you take up his ticket?

A. Yes, sir.

Q. Before you crossed the Oklahoma line?

A. Yes, sir.

Q. And he was ticketed to Allen, Oklahoma, was he?

A. Yes, sir.

Q. When your train reached Allen, did the defendant leave it?

A. Yes, sir.

Q. Did he take anything with him?

A. When I saw him, he had two grips in his possession.

Q. The two suit cases that he got on with at Denison?

6 A. I can't say whether it was the same two or not.

Q. Well, describe the two suitcases that he got on the train with at Denison.

A. Well, I can't describe them thoroughly, because I didn't pay much attention to them; I just saw it was two suitcases. I can't say whether they were new ones or old ones; just two.

Q. Well, then, describe the grips or suitcases that he got off with at Allen.

A. Well, they looked to be something the same that he got on the train with at Denison.

Q. They were similar in appearance, were they?

A. Similar in appearance, yes sir.

Q. Did anything happen to him at Allen that day when he got off the train?

A. After he had gotten off, why I was notified that he was arrested.

Q. That was the day of his arrest?

A. Yes, sir.

Q. And he come from Denison, Texas, with those suitcases, to Allen, Oklahoma, on your train?

By Mr. Denton: We object; repetition.

By the Court: Sustained.

By Mr. Linebaugh: I withdraw that; repetition.

Q. That in the day time or night?

A. In the day time, a. m.

Q. Your train was scheduled to leave Denison, Texas, at 8 a. m.?

A. I believe so, yes, sir.

Q. And arrived at Allen, Oklahoma, at what time?

A. 12:20 p. m., I believe.

A. And what time were you due at Tupelo, Oklahoma?

A. Well, I believe it is 11:30, I am not sure.

Q. That train runs from Denison, through Tupelo, to Allen?

A. Yes, sir.

Cross-examination.

By Mr. Lee:

Q. You say you didn't notice the suitcases closely?

A. No, sir; I didn't.

Q. He got on with two suitcases, you have stated.

A. Yes, sir.

Q. Were there any persons besides him getting on the train at the same time?

A. There were quite a number of others, yes, sir.

Q. I will ask whether or not there were just a few or something of a crowd getting on the train there at Denison that morning.

A. Well, sir, I can't state the exact number unless I had my ticket report.

Q. I understand, but were there a number or just a few?

7 A. Well, I can't say positively how many got on.

Q. Well what do you say about that?

A. I stated that there were a number.

Q. Number of people?

A. Number of parties, yes, sir.

Q. Were they ladies, gentlemen?

A. Mixture.

Q. Mixture of ladies and gentlemen, all getting on the train there together?

A. Yes, sir.

Q. Was Greer with them?

A. Yes, sir, he was in the bunch.

Q. He was in the bunch getting on?

A. Yes, sir.

Q. And he had two suitcases?

A. Yes, sir.

Q. When you saw him?

A. Yes, sir.

Q. Now where was he when you first saw him, Mr. Johnson?

A. Getting on the train.

Q. He was getting on when you first saw him?

A. Yes, sir.

Q. You didn't see him on the platform before that time?

A. No, sir.

Q. And I believe you stated you saw him after he got off at Allen, or did you see him get off?

A. I saw him after he got off at Allen, yes, sir.

Q. There he had two suitcases?

A. When the officer had him in custody.

Q. The only similarity is that there were two suitcases in one instance and two suitcases in the other, is that all?

A. Yes, sir.

Q. There were just two suitcases?

A. Yes, sir.

Q. You don't know whether they were old, new, or anything like that?

A. I can't describe them; he just had two suitcases.

Q. Did you know what was in the suitcases?

A. I did not, sir.

Q. At Denison?

A. No, sir.

Q. Or at Allen?

A. No, sir.

Q. Or at any time?

A. No, sir.

Q. This M., O. & G. goes north out of Denison through Durant, does it?

A. Yes, sir.

Q. And Durant is a division point on the Frisco, isn't it?

A. I don't know.

Q. It crosses the Frisco at Durant, does it?

A. You said division, did you not?

Q. I believe I said that; excuse me. It crosses the Frisco at Durant?

A. It is a junction point.

Q. Well, say this is Red River and here is Denison, and up there is Durant. It goes north to Durant, on north through Wapanucka, doesn't it?

A. Yes, sir.

Q. And through Tupelo?

A. Yes, sir.

Q. And on to Allen; how far north of Tupelo is Allen, Mr. Johnson?

A. Twenty-one miles, I believe.

Q. Twenty-one.

A. I believe it is twenty-one.

8 Q. And I believe you said from Denison to Allen was how far?

A. Ninety-six.

Q. Ninety-six miles?

A. Yes, sir.

Q. Then it goes on up to Muskogee?

A. Yes, sir.

Q. And this was a day run?

A. Yes, sir.

Q. Now, we will say this is Oklahoma City; Oklahoma City, you know, is northwest of Tupelo, do you?

A. Well, it is in a western direction; I can't say whether it is north or not.

Q. And is there a Katy train that goes down through Tupelo?

A. Yes, sir.

Q. M., K. & T.?

A. Yes, sir.

Q. Goes through Coalgate, doesn't it?

A. Yes, sir.

Q. And Atoka and connects with the main line?

A. Yes, sir.

Q. Now at that point, I will ask you if this is a division point, know about that?

A. It is not.

Q. It is not?

A. No, sir.

Q. Is there a union station there or two different depots?

A. It is a junction instead of a division.

Q. A junction?

A. Yes, sir.

Q. How many depots are there?

A. One.

Q. Just one depot?

A. Yes, sir.

Q. Both trains have access to the same depot?

A. Yes, sir.

Q. Both roads, I mean; there at Tupelo?

A. Yes, sir.

Q. Now, how long did you stop there?

A. Well, from the amount of baggage that they load, from on- to three minutes. The law requires you one minute at a junction.

Q. One minute?

A. Yes, sir.

Q. But how long did you stop really, Mr. Johnson?

A. Well, I can't say. The stop at junction point is from one to three minutes.

Q. You must stop a minute, anyway?

A. Yes, sir.

Q. Baggage or no baggage?

A. Yes, sir.

Q. When there is baggage, of course that consumes time?

A. Yes, sir.

Q. Wasn't there usually baggage there from the Katy?

A. Yes, sir, frequently, yes.

Q. Maybe I have asked you as to how long the stop usually was, without regard to the schedule, as a matter of fact?

A. Well, that is as near as I can give you.

Q. You don't want to say any more definite than that?

A. No, sir.

Q. Do you attend to the baggage yourself?

A. No, sir.

Q. Did you take orders there?

A. No, I don't believe I received orders there that day.

Q. Usually would you take orders there at that connection?

9 A. Usually don't take an order there on the passenger trains.

Q. Did Mr. Greer get off there?

A. I can't say.

Q. You don't know whether he got off at Tupelo or not?

A. No, sir, I don't.

Q. You know it stopped there that trip?

A. Yes, sir.

Q. Do you know how long it stopped there on that trip, Mr. Johnson?

A. I can't say.

Q. You don't know?

A. No, sir.

Q. Do you know how far it is from Oklahoma City to Tupelo?

A. I do not.

Q. Could any person, Mr. Johnson, have alighted from the train and procured baggage and gotten back, during the stop on that trip?

A. I couldn't say because I don't know how long I was there.

Q. You don't know how long you were there?

A. No, sir.

Q. Usually, however, they could, could they not?

A. Well I can't say.

Q. You don't want to say about that?

A. No.

Q. As a matter of fact, that was not your concern?

A. I wasn't attending to that part of it, no, sir.

Q. Is that approximately a diagram—it is rather rough, but is that approximately a diagram of the road? We will say that is Denison, the point indicated by the pencil, and that Durant. The Frisco at Durant does east and west, doesn't it?

A. Yes, sir.

Q. And that Wapanucka, and the point indicated there is Tupelo, and Allen is twenty-one miles north of that; here is the Katy; it runs from Oklahoma City southeast, does it not?

A. Well it passes through Tupelo practically east and west.

Q. Well it passes through there directly east and west, but the general direction of the road is northeast and southwest, isn't it?

A. I can't say.

Q. You don't know about that?

A. No, sir.

Q. Assuming, then, that that goes east and west through the town, is that approximately about a correct diagram?

A. Well, that is a similarity, yes; similar position.

By Mr. Lee: We offer it.

By the Court: Any objection?

By Mr. Linebaugh: No, sir.

By the Court: It may be admitted.

10      Redirect examination.

By Mr. Linebaugh:

Q. At Tupelo there is a junction of the M., K. & T. and the M., O. & G?

A. Yes, sir.

Q. And one depot serves for both roads?

A. Yes, sir.

Q. How far, approximately, is that depot from the town of Tupelo?

A. Well it must be three-fourths of a mile.

Q. Must be three-quarters of a mile?

A. Something near that distance, yes, sir.

Q. There are not any houses about the depot, are there Mr. Johnson, except just the depot?

A. Yes, sir.

Q. At the crossing of the M., K. & T. and the M., O. & G. tracks?

A. A restaurant there, where it crosses the Katy.

Q. South?

A. Yes, sir.

Q. About how far is that?

A. Probably a hundred foot, about.

Q. And that is the only improvement about that depot at all, isn't it?

A. I haven't any knowledge of any, that I recollect of.

Q. You stop there from one to three minutes?

A. Something like that, yes, sir.

Recross-examination.

By Mr. Lee:

Q. Do you remember what day of the week that was, Mr. Johnson?

A. No, I do not.

Witness dismissed.

Mr. Linebaugh: My attention has just been called to the fact that the record fails to show a plea on the part of the defendant. I presume the record may show a plea of not guilty?

The Court: The record may show a plea of not guilty.

And thereupon E. L. PEGG, being called on behalf of the United States, and being first duly sworn, testified under oath as follows:

Direct examination.

By Mr. Linebaugh:

Q. You may state your name.

A. E. L. Pegg.

Q. Where do you live, Mr. Pegg?

A. Allen, Oklahoma.

Q. How long have you lived there?

11 A. Well, it has been my home practically for twenty-five years.

Q. Do you know the defendant J. Knox Greer?

A. Yes, sir.

Q. Where does he live?

A. He has been making that his home.

Q. Allen?

A. Yes, sir.

Q. Is Allen in what was formerly the Indian Territory?

A. Yes, sir.

Q. What business is the defendant—was the defendant engaged in at Allen in August, 1915?

Mr. Denton: We object to the question as irrelevant, incompetent, and immaterial.

The Court: Overruled.

Mr. Denton: The defendant excepts.

Q. Answer.

A. In the drug business.

Q. Did you see the defendant on an M., O. & G. train on or about the 30th of August, 1915?

A. I don't remember the date, judge; but I saw him on a train, yes, sir, about that time.

Q. With reference to the time that he was arrested by Mr. Bob Duncan, the sheriff of Pontotoc County, did you see him that day?

A. Yes, sir.

Q. Where did you get aboard that train?

A. At Tupelo.

Q. Was he on the train when you got aboard?

A. Yes, sir.

Q. How long after the train arrived at the station of Tupelo, Mr. Pegg, did you get aboard? Immediately upon its arrival, or—

A. Well, yes, sir; before it started out; just before.

Q. After the passengers destined for Tupelo had alighted—

Mr. Lee: Rather think that is leading, if the court please.

The Court: Don't lead the witness.

Q. With reference to when the passengers for Tupelo had alighted from the train, when did you get aboard?

A. Well, I rather think after the conductor hollered all-aboard.

Q. When you got aboard, did you find the defendant on board of the train?

A. Well I saw him on the train before I got aboard; through the window.

Q. You saw him through the window?

A. Yes, sir.

Q. Did you talk with him through the window?

12 A. I believe I spoke to him.

Q. And how long after the arrival of the train from the south at Tupelo was it that you noticed the defendant through the window on the train?

A. Well, I can't say; I think possibly just before I went up the steps.

Q. Just before you went up the steps?

A. Yes, sir.

Q. And where were you seated on the car with reference to where the defendant was seated?

A. Well, I think I had two positions—two seats in the car on the run up to Allen; part of the way I went up and sat in the seat with him.

Q. Now on the way from Tupelo to Allen did you have any conversation with him concerning any suitcases that he wanted to take off at Allen?

A. Well, there was something said about some suitcases, yes, sir.

Q. Just tell the jury what was said.

A. He asked me if I had a grip with me, I believe, the best of my recollection; I told him I did; he said well I have a couple; I was going to make you carry one of them up town for me.

Q. State whether or not he stated to you there where he had been.

A. No, in a casual way, though, I believe he told me he had been down to his father's.

Q. In Texas?

A. Yes, sir.

Q. Did he get off of the train at Allen?

A. Yes, sir.

Q. Did you get off?

A. Yes, sir.

Q. Did you see him leave the train?

A. Yes, sir.

Q. Did he carry any baggage off the train with him?

A. Yes, sir, he had a couple suitcases.

Q. Do you remember how long the passenger train stopped at Tupelo that day, approximately how long?

A. No, sir, I don't.

Q. Was it a long time or a short time, do you remember?

A. No, I don't remember anything about what time it consumes in that—

Cross-examination.

By Mr. Lee:

Q. Did you live at Ada, Mr. Pegg?

A. No, sir; I live at Allen.

Q. How long did the trains usually stop there?

A. At Tupelo?

Q. Yes, sir.

A. Really, I never noticed the schedule.

Q. You don't know about that?

A. No, sir.

Q. And in going from Tupelo, however, up to Allen, you sat with Mr. Greer in the seat with him?

13 A. Yes, sir; part of the way.

Q. He spoke to you about the grips?

A. Yes, sir.

Q. Called your attention to them?

A. Yes, sir.

Q. And asked you if you would carry one of them for him?

A. Yes.

Q. Were you deputy sheriff at that time?

A. No, sir.

Q. Were you any officer at all?

A. No, sir, not at that time.

Q. Was it understood that you would be, Mr. Pegg?

A. No. I can tell you, if you will allow me, the conversation there was about my being deputy sheriff later, at that time. I saw Mr. Duncan, the high-sheriff, at Ada, and I told Mr. Greer that he had requested me or asked me to take the deputyship at Allen later on, but I told Mr. Greer I didn't know what to do about it; wasn't in position to handle it, didn't want the deputyship. That was the only thing said about it.

Q. Was some reference to that made in the conversation between you and Mr. Greer?

A. To that extent.

Q. And was it after that or before that that he spoke to you about assisting him with the grip, do you remember?

A. I don't remember, judge; during the time I was in the seat with him. I don't know which conversation occurred first.

Q. You don't know about that?

A. I don't remember.

Q. Well, did you attempt to assist him in taking the grip as he suggested?

A. No, sir.

Q. You didn't do that?

A. No, sir.

Q. He told you he had been visiting his father in Texas at that time?

A. Yes, sir.

Q. Did you know that his father lived in Texas?

A. Yes, sir.

Q. Where did he live?

A. Well, now, I knew he lived there; I had met the old gentleman and he had told me where he lived in Texas, and I don't know the exact location, or where he lived, but it was understood by me that he was a Texas man.

Q. You don't remember the town?

A. Well, I——

Q. Was it McKinney?

A. I think it is McKinney.

Witness dismissed.

And thereupon BOB DUNCAN, being first duly sworn, testified under oath on behalf of the government as follows:

Direct examination.

By Mr. Linebaugh:

Q. You may state your name.

A. Bob Duncan.

Q. Where do you live, Mr. Duncan?

14 A. Ada, Pontotoc County, Oklahoma.

Q. What official position if any do you hold in Pontotoc County?

A. I am sheriff.

Q. Were you sheriff in Pontotoc County in August, 1915?

A. Yes, sir.

Q. Is the town of Allen in Pontotoc County?

A. Yes, sir.

Q. It is also in what was formerly Indian Territory, is it, Mr. Duncan?

A. Yes, sir, yes, sir.

Q. Do you know the defendant J. Knox Greer?

A. Yes, sir.

Q. Do you recall and incident of his having arrived at Allen on a northbound M. O. & G. train, passenger train, on August 30th, 1915?

A. Yes, sir.

Q. Were you down at the station that day?

A. Yes, sir.

Q. For what purpose were you at the station?

Mr. Denton: We object, if the court please, as to what purpose the witness was at the station.

The Court: It probably would be immaterial, as to the purpose. Say what he did.

Q. Did the defendant J. Knox Greer get off the M. O. & G. train that day?

A. Yes, sir.

Q. Did he take anything off of the train with him?

A. Two suitcases.

Q. What if anything did you do after he alighted from the train?

A. I arrested him; called to him almost immediately after he got off the train; probably fifteen or twenty steps from the train, before he stopped.

Q. At the time you arrested him, did he have the same two suitcases that he got off the train with?

A. Yes, sir.

Q. Where did you go, if you went any place, from the place where you arrested him?

A. We went to Mr. Greer's drug store, about two blocks from the depot.

Q. He had a stock of drugs there at Allen, did he?

A. Yes, sir.

Q. And when you got to the drug store, what happened?

A. We walked into the back end of the drug store and Mr. Brents was in the drug store and we all went into the back room and we opened the two suitcases.

Q. You opened the two suitcases?

A. Yes, sir.

Q. What did the two suitcases contain, Mr. Duncan?

A. One contained twelve quarts of whiskey and the other contained ten pints of whiskey and some wearing apparel.

Q. One suitcase contained twelve quarts of whiskey and the other suitcase ten pints of whiskey?

A. Yes, sir.

15 Q. Do you remember the brand or brands of the whiskey?  
A. The quarts were Jersey Cream; the pints were Hill and Hill.

Q. Did you observe the labels on the bottles?

A. Yes, sir.

Q. Where if you remember was the whiskey bottled or sold?

Mr. Denton: We object, if the court please, as incompetent, irrelevant, and immaterial; hearsay and not the best evidence.

The Court: The objection is sustained.

Q. Mr. Brents was present at the time the suitcases were opened there in the store?

A. Yes, sir; he opened one and I opened the other.

Q. Was the suitcases that you opened in the store and out of which you took this whiskey, the same two suitcases that the defendant got off of the M. O. & G. train with?

A. Yes, sir, he carried them himself.

Q. He carried them himself?

A. To the drug store, yes, sir.

Q. After you arrested him, you had him carry them on up to the store?

A. Yes, sir.

Cross-examination.

By Mr. Lee.

Q. And he had them when you arrested him did he, Mr. Duncan?

A. Yes, sir.

Q. Just went on up to the store?

A. Yes, sir.

Q. And you went with him?

A. Yes, sir.

Q. And there you opened them and found they contained this liquor you described?

A. Yes, sir.

Q. Did one of these cases contain some clothing?

A. Yes, sir, some articles of clothing; I don't remember just what.

Q. The customary articles found in grips usually carried, shirts and socks?

A. My recollection, shirts and socks and possibly a vest; I don't remember now.

Q. Just the usual articles.

A. Yes, sir.

Q. That was in one of the grips; do you remember which one?

A. I believe it was the grip that had the pints in it.

Q. It had the smaller quantity?

A. Yes, sir.

Q. The twelve quarts nearly filled the other case, didn't it?

A. Yes, sir.

Q. You don't know where it came from?

A. No, sir, I don't.

Q. Whether it came from Oklahoma City or Denison, or any other point; you don't know anything about that.

16 A. I never saw Mr. Greer or the whiskey until the train came in.

Q. That is all you know about it?

A. Yes, sir.

Q. Don't know whether he got it at Tupelo or—this was north of Tupelo, was it, Allen was?

A. North of Tupelo, yes, sir.

Q. You were sheriff at that time?

A. Yes, sir.

Q. Sheriff now, are you not?

A. Yes, sir.

Q. Mr. Brents knows the same about that transaction that you do, at least he was present?

A. Yes, he was present when the suitcases were opened.

Redirect examination.

By Mr. Linebaugh:

Q. Did you hear Mr. Greer, Mr. Duncan, at that time make any statement as to where he had been, to Mr. Brents?

A. He and Mr. Brents were talking there, but I don't remember the statement that he made.

Q. You don't remember what was said?

A. No, sir, I don't.

Witness dismissed.

And thereupon T. E. BRENTS, being called on behalf of the United States, duly sworn, testified as follows:

Direct examination.

By Mr. Linebaugh:

Q. You may state your name.

A. T. E. Brents.

Q. What official position, if any, do you hold, Mr. Brents?

A. Special Officer, Department of the Interior.

Q. Where is your home?

A. Ada, Oklahoma.

Q. Were you Special Officer of the Interior Department in August, 1915?

A. I was.

Q. Did you have occasion in your official capacity to go to the place of business of the defendant, J. Knox Greer, at Allen, Oklahoma, on that day?

A. I did.

Q. Did you see the defendant there on that day?

A. I did.

Q. Just tell the jury the circumstances of your having seen him.

A. I was standing in the drug store of the defendant, up near the front, talking with the manager, Mr. Barlett; Mr. Greer came in the front door carrying two suitcases, one in each hand.

Q. Was anybody with him?

A. No, sir, he was alone; Mr. Duncan came in right afterwards.

Q. Did you and Mr. Duncan open the two suitcases?

17 A. Yes, sir; I started to take them from Mr. Greer there in the front of the building, and he asked me to accompany him to the back end, and we would open them up. Mr. Greer, Mr. Duncan, and I went into the back end of the building and I opened one of the suitcases and Mr. Duncan opened the other.

Q. What did the two suitcases contain?

A. One had twelve quarts of Jersey Cream whiskey in it, and the other one some wearing apparel and ten pints of Hill and Hill in it.

Q. Did the defendant make any statement to you there as to where he had been, where he got this whiskey?

A. He didn't there; he did at Ada, going over with him.

Q. What did he say?

A. He said he got it at Ardmore.

Q. Got it at Ardmore?

A. Yes, sir.

Q. That time and place and incident is the same as just testified to by Mr. Duncan, the sheriff?

A. Yes, sir.

Q. Mr. Brents at that time, do you know what time—I will first ask you if the Katy railroad, from Oklahoma City to Atoka runs through the City of Ada, through the town of Tupelo, and on to a connection with the main line of the M. K. & T. at Atoka.

A. They don't make close connection. I missed that train there.

Q. Just answer my question: Does the Katy railroad run from Oklahoma City, through the City of Ada, through Tupelo, and on to Atoka?

A. Yes, sir.

Q. Do you know how far it is along the line of that railroad from Ada to Tupelo?

A. I think it is twenty-two miles, something like that.

Q. Do you know what the schedule time of the train was at Ada at that time?

A. My recollection is 11:30.

Q. Eleven-thirty?

A. My recollection is 11:30.

Q. 11:30—

A. A. M.

Q. A. M.?

A. Yes, sir.

Q. And then from Ada it was twenty-two miles farther down the road to Tupelo?

A. Yes, sir.

Q. You don't know the schedule time at Tupelo of the train?

A. No, sir; I don't.

Q. But you do know that the schedule time at Ada, at that time, was 11:30?

A. Yes, sir; I missed that train; I intended going on it that day.

Q. In other words, that day the M. K. & T. arrived at Tupelo after the M. O. & G. had gone north from Tupelo?

A. The M. O. & G. was considerably late that day, arriving at Allen about two-thirty-five or three o'clock in the afternoon, as I remember it.

18 Q. And that day the M. O. & G. had left Tupelo at the time the M. K. & T. arrived in Tupelo?

A. Yes, sir.

Cross-examination.

By Mr. Lee:

Q. You don't know yourself anything about this liquor, Mr. Brents, except that it was brought in there when you was there?

A. That is all.

Witness dismissed.

Mr. Linebaugh: That is our case.

The Court: Proceed with the defense.

Mr. Denton: If the court please, at this time the defendant demurs to the evidence on the part of the government, on the ground that it is insufficient to support the charge contained in the indictment.

The Court: Overruled.

Mr. Denton: The defendant excepts.

And thereupon evidence is introduced as follows:

On Behalf of the Defendant.

J. KNOX GREER, being first duly sworn, under oath testified as follows:

Direct examination:

By Mr. Lee:

Q. Your name is J. Knox Greer?

A. Yes, sir.

Q. You are the defendant in this case, Mr. Greer, are you?

A. I am.

Q. Where do you live?

A. Allen, Oklahoma.

Q. Do you live at Allen at this time?

A. At this time, no, sir, practically I live in Oklahoma City; moved to Oklahoma City.

Q. What business are you engaged in there?

A. O. K. Bus and Baggage.

Q. In the O. K. Bus and Baggage business at Oklahoma City at this time?

A. Yes, sir.

Q. You had lived at Allen, had you Mr. Greer?

A. Yes, sir.

Q. And in August of last year you lived at Allen?

A. Yes, sir.

Q. Is your father living?

A. He is.

Q. Where did he live last August?

A. McKinney, Texas.

19 Q. Where?

A. McKinney, Texas.

Q. That is between Sherman and Dallas, is it?

A. Yes, sir.

Q. Did you occasionally visit your father or do you yet?

A. I do.

Q. Last August did you make him a visit?

A. Yes, sir.

Q. How old is he?

Mr. Linebaugh: We object to that as immaterial.

The Court: Sustained.

Q. But you do visit him?

A. Yes, sir.

Q. Did you visit him last August—probably I asked you that before?

A. Yes, sir.

Q. About what time?

A. It was the latter part of August or the first of September, somewhere right along in there; my recollection is the latter part of August.

Q. In what way did you go down to McKinney?

A. Go to McKinney?

Q. Yes.

A. I went down the M. O. & G. and took the interurban.

Q. At what point?

A. At Denison.

Q. Took the interurban at Denison?

A. Yes, sir.

Q. And went from there to McKinney on the interurban?

A. Yes, sir.

Q. How long did you remain in McKinney, how long was your visit?

A. The best I recollect, two or three days.

Q. And then what did you do?

A. I went back home; back to Allen.

Q. Was any of your relatives living in McKinney except your father?

A. No, sir.

Q. That you visited?

A. No, sir, I haven't no relatives in McKinney except——

Q. Except your father?

A. Yes, sir. While I was there I visited my grandmother and sister, also at——

Q. Well, you were making a visit?

A. Yes, sir, visiting relatives there.

Q. Do you know where Tupelo is located?

A. Yes, sir.

Q. On what road or roads?

A. On the M. K. & T., the old Oklahoma Central, and the M. O. & G.

Q. Do you know whether the M. K. & T. goes from Oklahoma City down through Tupelo on through Coalgate and Atoka?

A. It does.

Q. Where do the roads cross there or rather is there a depot there?

A. Yes, sir.

Q. Is there a depot for each road or one union station?

A. There is a depot for the M. K. & T. and M. O. & G.  
20 and also there is a depot down below there of the Oklahoma Central.

Q. Was you acquainted in Tupelo?

A. Some, yes, sir.

Q. How large a place is it, Mr. Greer?

A. Tupelo, I consider it a town of three or five hundred people.

Q. You are just estimating the population?

A. Yes, sir, just estimating, guessing at it.

Q. In going down, had you seen any person at Tupelo?

A. In going down?

Q. Yes, sir.

A. Yes, sir.

Q. State if you made any contract or had any understanding with any person.

A. I did. I was—it was on Saturday I seen the party, going down there, and I told him to have a party, known by the name of Red I understood his name was Phillips, to meet me at the depot on Sunday; and I told him about the time I would be back, about three or four days afterward.

Q. Did you come back about the time?

A. About the same time; something like three or four days afterwards.

Q. Did you come back through Denison?

A. Through Denison, yes, sir.

Q. Did you get on the train at Denison?

A. Yes, sir.

Q. What baggage did you have there?

A. Getting on the train?

Q. Yes.

A. I had two grips.

Q. Well, what baggage did you carry, Mr. Greer, in leaving McKinney, what baggage did you have?

A. In leaving McKinney I had one grip.

Q. Where did you go from McKinney?

A. From McKinney, well I think I stopped at Anna, also, and went on to Denison.

Q. That is a small town in Grayson, is it?

A. Anna is in Collins County; right near the line, yes, sir.

Q. Where did you get the other grip?

A. In Denison.

Q. Tell the jury about it.

A. I stopped at a house there and a lady saw my name registered there and asked me—I was going on the M. O. & G., saw I was at Allen, and she asked me to carry the grip down and put it on the train for her, and I told her I would, and I carried the grip down there and put in on the train.

Q. Do you know whether she got on or not?

A. Yes, sir.

Q. Did anybody else get on except yourself at that time?

A. There were several on the train, yes, sir.

Q. I mean in getting on the train.

A. In getting on the train?

21 Q. Yes.

A. Well, just at the time I got on, I can't say; don't remember that there was, but it seems to me like two or three were right after me.

Q. Getting on the train?

A. Yes, sir.

Q. Do you know what became of the lady or the grip?

A. I do not.

Q. You don't know about that?

A. No, sir. After I got on the train I went to sleep, and she was off the train when I woke up.

Q. Do you remember when you reached Tupelo?

A. Tupelo, yes, sir.

Q. What happened there, if anything?

A. The party that I had asked to meet me, he met me there with two grips.

Q. State what you did.

A. He put the grips on the train and changed one of them and put the whiskey in my suitcase.

Q. You mean the one you were carrying?

A. The one I was carrying, yes, sir.

Q. Was there anything else in that?

A. Some clothes, wearing apparel.

Q. And what was done with the other?

A. It was set on the train.

Q. What did you do with it?

A. I got off with it at Allen.

Q. I understand, but what did you do with it on the train?

A. Who?

Q. This grip that was put on, your own grip that you had when you got on at Denison?

A. Well, it was set at the back end of the coach, behind the seat.

Q. Did you or not see Mr. Pegg?

A. Mr. Pegg, yes, sir, I seen him.

Q. Did you see him before he got on the train?

A. Yes, sir.

Q. Where did you see him?

A. Tupelo.

Q. You saw him at Tupelo?

A. Standing on the platform.

Q. Saw him on the platform?

A. Yes, sir.

Q. And state whether or not you saw him after that time?

A. Yes, sir; he got on the train that I was on.

Q. Did you see — after he got on?

A. Yes, sir.

Q. Where did he sit?

A. Part of the time he sat with me and part of the time he sat over on the other seat across the aisle.

Q. Did you have any conversation with him?

A. Yes, sir.

Q. What did you tell him as to where you had been, if anything?

22 Mr. Linebaugh: We object to that, incompetent and inadmissible. No, I withdraw that.

The Court: He may answer.

A. To my recollection, I told him I had been down to see my father.

Q. Was that correct?

A. Yes, sir.

Q. Was anything said about these grips there; did you call his attention to them, or not?

A. Yes, sir.

Q. What did you ask him about them?

A. Told him I had three grips and asked him if he would help me carry one of them off.

Q. You knew him well, did you?

A. Yes, sir.

Q. He was a good citizen there?

A. Yes, sir.

Q. You knew that?

A. Yes, sir.

Q. Do you know Mr. Duncan?

A. Yes, sir.

Q. The sheriff?

A. Yes, sir.

Q. State *whether* he was when you got off at Allen, if you saw him.

A. Well, the first I remember seeing Mr. Duncan, he hollered at me after I had got off the car.

Q. Call your name?

A. Yes, sir.

Q. What happened then?

A. He told me to wait or something like that, and he walked on down by me and he said he wanted me up at the store.

Q. Well, what did you do?

A. He walked on down with me and we walked on up to the store.

Q. You went in the store?

A. Yes, sir.

Q. And what was done with these two suitcases?

A. The two suitcases were carried on to the back end of the store and set down.

Q. What was in them?

A. Whiskey and clothing.

Q. Whiskey and clothing. Where had you got that whiskey, Mr. Greer?

A. Where had I got it? On the train at Tupelo.

Q. Had you introduced any of that from Texas?

A. No, sir.

Q. Had you brought it to this district from any point at all, yourself?

A. No, sir.

Q. You got it at Tupelo?

A. Yes, sir.

Q. Was it yours, Mr. Greer?

A. Sir?

Q. Was it your whiskey?

A. Yes, sir.

Q. What did you want with it?

A. To drink.

Q. Do you drink?

A. I do sometimes.

Q. Had you or not prior to that time seen this party at Tupelo?

A. Party that put this on that car?

23 Q. Yes.

A. Yes, sir.

Q. Do you know where he is now?

A. No, sir, I haven't seen him for some time.

Q. You haven't seen him for some time. Do you know whether he is at Tupelo now or not?

A. No, sir, I can't say.

Q. You don't know about that?

A. No, sir.

Q. I will ask you, Mr. Greer, if about one year ago, or perhaps one and a half years ago, if you were charged with introducing liquor in this court.

A. Not introducing. I don't think; for selling, I think it was.

Q. You think there was that charge against you?

A. I think it was for selling, yes, sir.

Q. I will ask if you plead guilty.

A. I did.

Q. Have you in any way handled or had any connection with

liquor, except to drink it or in the manner in which you stated, since that time?

A. Except for my own personal use, no, sir, I have not; haven't sold any from that day to this.

Q. And you say you have now gone to Oklahoma City?

A. Yes, sir.

Q. Where you are in the transfer business?

A. Yes, sir; I promised them at the time and I was trying to seil out and was going to move out of the Eastern part of Oklahoma.

Q. Have you done that?

A. I have.

Cross-examination.

By Mr. Linebaugh:

Q. Who did you say it was you saw to send word to the Tupelo man?

A. Who was it that I saw?

Q. Yes.

A. I don't know his name.

Q. What kind of looking fellow was he?

A. Well, sir, he was a small fellow, that is a medium built man, I would call him; weighed something like one hundred and thirty-five pounds; young fellow about twenty-five years old.

Q. And where did you see him?

A. Where did I see him?

Q. Yes.

A. I don't know his name.

A. At Allen.

Q. And what did you tell him?

A. What did I tell him?

Q. Yes.

A. I told him to tell Red to meet the train Sunday; I wanted to speak to him.

Q. Now, what day was this you were talking to him?

A. What day was I talking to him?

Q. Yes.

A. At Allen?

Q. Yes.

A. Saturday.

Q. And how many times had you seen him before that?

24 A. This fellow?

Q. This small like man that would weigh about one hundred and thirty-five pounds.

A. I can't state how many times I had seen him before.

Q. Had you ever seen him before?

A. Yes, sir.

Q. Where?

A. Well, I had seen him at Ada.

Q. What had you seen him doing at Ada?

A. Just seen him on the street; I don't know what he was doing.

Q. Where else had you seen him?

A. Well, seen him once going by on the Frisco.

Q. What was he doing that time?

A. He was on the train going up with me.

Q. You don't know what his name was?

A. No, sir.

Q. What did you call him?

A. Well, I just knew his face when I met him, was about all.

Q. When you wanted to hail him on the street to stop him, what did you call him?

A. I don't know that I ever wished to do that.

Q. You didn't know whether his name was Jim or Jack?

A. No, about the only way, we would just meet and speak.

Q. Who was Red?

A. They call him Red and my understanding is his name was Phillips.

Q. Where does he live?

A. Well, sir, I can't tell you where he lives; I have seen him at Tupelo.

Q. You had had business with him before that, had you?

A. Yes, sir.

Q. Of the same character?

A. Yes, sir.

Q. Now, you say then—what day was it you were going back and got caught with the whiskey there at Allen, what day of the week was it?

A. What day of the week?

Q. Yes.

A. My recollection is it was something like Wednesday or Thursday; I can't say for sure.

Q. And it was Saturday before that that you sent word for Red to meet you at Tupelo?

A. Yes, sir.

Q. By this small man weighing about a hundred and thirty-five pounds, that you didn't know his name?

A. Yes, sir.

Q. Then you hadn't been away from Allen over four days, had you Greer?

A. It was four or five days, something like that.

Q. Four or five days?

A. Yes, sir.

Q. Now the fact of the business is that you had been away from Allen about ten days or two weeks, hadn't you?

A. No, sir, I don't think so.

25 Q. Isn't it true that you went to Texas from Oilton and not from Allen?

A. No, sir.

Q. Isn't it true that you left Allen and went to Oilton and was up there for a while and from Oilton you went down to Texas and had been away from Allen for ten days or two weeks?

A. Not on this trip.

Q. That is not true?

A. No, sir; I have went from Oilton to Texas.

Q. But not on this trip?

A. No, sir.

Q. Did you have any business at Oilton?

A. At Oilton, yes, sir.

Q. What business were you engaged in up there?

A. I have a house there—built a house there this summer.

Q. The principal business you are engaged in up there is selling whiskey, isn't it?

A. No, sir.

Mr. Lee: We object to that and we take exception to the question.

Mr. Linebaugh: I think counsel went into that, if the court please.

The Court: He has answered it.

Q. Now you have been in the whiskey business at Allen ever since you have been there, haven't you, Greer?

A. No, sir.

Q. Have you been convicted in the courts of Pontotoc county for whiskey—selling whiskey?

A. Yes, sir.

Q. Charges pending against you there now for selling whiskey?

Mr. Denton: Wait. We object, if the court please, as to any charges.

The Court: Sustained.

Q. You have been selling whiskey at that drug store from the time you started it up to the present time?

Mr. Denton: Wait.

A. No, sir.

Mr. Denton: Wait a minute. We object as incompetent, irrelevant, and immaterial; and not proper cross-examination.

The Court: Overruled.

Mr. Denton: The defendant excepts.

Q. Now, you left your father's house at McKinney with one suitcase, is that right?

A. Yes, sir.

Q. What kind of looking suitcase was that?

26

A. Well, it was a kind of leather looking suitcase.

Q. Red, red, dark red, I believe. How much clothing did you have in that?

A. Well, I can't say exactly; some underwear, a traveling case.

Q. And what?

A. And I can't say what other little things there were in it.

Q. Have any suit of clothes?

A. No, sir, I don't think there was any suit of clothes in this suit case. Just remember the underwear and handkerchiefs.

Q. And there was plenty room to put in about ten pints of whiskey, was there, in that case?

A. Something like that, yes, sir.

Q. And then you just helped a lady down from the hotel at Denison, on the train, with another suitcase?

A. Yes, sir.

Q. What kind of looking suitcase was that, Greer?

A. Kind of a red suitcase.

Q. Kinder like that suitcase you had, wasn't it?

A. Sir?

Q. Did you understand my question?

A. No, sir, I didn't.

Q. Kinder like the suitcase you had, too, wasn't it? Both suitcases were kinder like, wasn't they?

A. Well, no, sir, not exactly; they were different size.

Q. But both were red leather suit cases or imitation leather?

A. Imitation leather.

Q. Now, who was this lady?

A. I don't know her name.

Q. What kind of looking lady was she?

A. She was a tall, slender built woman.

Q. And how many grips did she have?

A. I didn't see any others.

Q. Was it heavy?

A. Yes, sir.

Q. What hotel was it you stopped at at Denison?

A. I don't know the name of the hotel, but it is in the first block on the righthand of the street as you go up the street from the union depot.

Q. Now, you came over on the interurban from Sherman, did you?

A. Yes, sir.

Q. What time did you reach Denison?

A. From down home there——

Q. What time did you go through Sherman?

A. I don't remember now what time it was.

Q. Day time or night?

A. My recollection is it was along in the evening.

Q. Along in the evening?

A. Yes, sir.

Q. Well, did you stay all night there?

A. Yes, sir.

Q. And when was it you met this lady?

A. When was it I met this lady?

27 Q. Yes.

A. That morning.

Q. That morning just before you went to the train?

A. Yes, sir.

Q. How came you to find out she was going on the same train you were?

A. She noticed my name, I suppose, on the list, and asked me if I was going up on the M. O. & G. train.

Q. Oh yes, she asked you and asked if you wouldn't kindly carry her grip for her, did she?

A. Yes, sir.

Q. And you said certainly?

A. Yes, sir.

Q. And you took this grip and put it on the train; and then you went to sleep, when you got on the train, that right?

A. Yes, sir.

Q. And when you waked up the lady was gone, is that right?

A. Yes, sir.

Q. Where was it you were awakened?

A. Well, I don't remember exactly where I did wake up.

Q. About where was it?

A. Between about Kenefeck or Coleman, is my recollection.

Q. How come you to wake up; did anybody happen to disturb your sleep?

A. Yes, sir.

Q. And the lady and this suit case were gone, is that correct?

A. They were gone?

Q. Yes, sir.

A. I didn't see them any more, no, sir.

Q. Now, what was it you told this fellow that weighed about a hundred and thirty-five pounds and a small-like man, to tell Red?

A. The party that I saw at Allen?

Q. That is it, yes.

A. What did I tell him?

Q. Yes.

A. Told him to tell Red to meet me Sunday at the train.

Q. At Tupelo?

A. Yes, sir.

Q. And Red met you?

A. Yes, sir.

Q. Now what did you tell Red?

A. What did I tell Red?

Q. Yes.

A. I told him I wanted some whiskey.

Q. Just tell the jury now exactly what you told Red.

A. I told Red I wanted some whiskey and I would be back about Wednesday or Thursday.

Q. You wanted some whiskey and you would be back Wednesday or Thursday?

A. Yes, sir.

Q. You told Mr. Lee that you told him that you would be back in three or four days. Now which was it that you told him, three or four days or that you would be back Wednesday or Thursday?

A. Well, it could be about four or five days afterward.

Q. Now which was it you told him that you would be back in three or four days or that you would be back Wednesday or Thursday?

28 A. Told him both; would be back in three or four days, something like Wednesday or Thursday.

Q. And told him you wanted some whiskey?

A. Yes, sir.

Q. Did you tell him how much?

A. Yes, sir.

Q. Now I want you to tell the jury exactly what you told Red; just use your language.

A. I told him I would be back in three or four days, something like Wednesday or Thursday, and I wanted some whiskey, and he says how much, I said about a case and a half.

Q. Something like a case and a half?

A. Yes.

Q. Did you tell him what kind you wanted?

A. No, sir.

Q. You were not particular about the brand you wanted?

A. Couldn't be in Eastern Oklahoma.

Q. And the train came in, when you got back from Denison, and Red was right there with the liquor, was he?

A. Yes, sir.

Q. Standing out on the platform, was he?

A. Put it on the back end of the car.

Q. Well, where was Red when the train pulled in to Tupelo, you were looking for him weren't you?

Q. The first I seen him, he walked up the back end of the coach.

Q. Did you have your head out of the window, looking for him?

A. When we went into Tupelo?

Q. Yes.

A. No, sir.

Q. And he got up on the back end of the coach?

A. Yes, sir.

Q. Now what did he have?

A. A grip.

Q. A grip?

A. Two grips.

Q. What kind of a grip did he have?

A. One of these suitcases and a little hand grip.

Q. Now what sort of looking suitcase was that?

A. Kinder of a leather covered suit case, red.

Q. Just scrtter like the lady had down at Denison?

A. Yes, sir, something similar. My recollection is this was a little darker case though than the other one.

Q. And what was in that suit case?

A. The one that he put on the train?

Q. Exactly.

A. Whiskey.

Q. How much whiskey?

A. In that suit case I believe it was twelve quarts; that is what they claimed it to be. I didn't open it until they opened——

Q. You didn't open it?

A. No, sir, not until they opened it.

Q. And where did you get the other whiskey?

A. I handed him my suit case and he took it out of his little grip, the handgrip that he had.

29 Q. All that occurred on the back end of the M. O. & G. train?

A. Not exactly on the back end, I think he went into the toilet.

Q. You think he did? Well, did he?

A. I can't say; I handed him my grip and he went back to the back end of the back chair, and I went and sat in the seat and raised the window.

Q. You didn't know what he put in the grip then until you got to Allen?

A. The big one?

Q. Either one of them.

A. The bigger one, I did.

Q. How did you happen to know it then?

A. I got up and looked in one of them.

Q. But before the train left, you didn't know what he put in your grip?

A. No, sir.

Q. How much did you pay him?

A. Something like twenty-eight dollars.

Q. Well, how much was it?

A. \$28 is my recollection.

Q. In what sort of money?

A. Greenbacks and silver.

Q. How much in greenbacks and how much in silver?

A. Twenty-five greenbacks and about three of silver.

Q. Then you didn't know where this whiskey was coming from?

A. Didn't know where it was coming from?

Q. Yes.

A. No, sir.

Q. Well if you told Red that you would be there in three or four days, how did Red know which day to look for you?

A. I don't know, unless he met both trains.

Q. Well was it the third day or the fourth day that you came back?

A. I can't say exactly.

Q. Now then these were the same suitcases that Mr. Duncan arrested you with at Allen?

A. Yes, sir.

Q. You told Ed Brents that you had gotten that whiskey at Ardmore, didn't you?

A. I don't remember telling Mr. Brents that, no, sir.

Q. Do you deny that?

A. I don't remember telling him that.

Q. I ask you if it is not further true that you asked Mr. Brents how much he would take to turn you loose?

A. No, sir.

Q. That is not true?

A. I certainly don't remember anything like that.

Q. But you told him you had been to Ardmore and got this whiskey at Ardmore, didn't you?

A. I don't remember telling Mr. Brents anything of that kind.

Q. You got that whiskey and brought it from Texas for the purpose of selling it, didn't you?

A. No, sir; I didn't.

Q. What hotel did you stop at in Dallas, Texas, on that trip?

30 A. I don't remember that I stopped at any hotel on that trip.

Q. What were you doing at Dallas on that trip?

A. I don't remember being at Dallas.

Q. You were in Dallas, were you not?

A. I was; I usually stop at the Adolphus, where I stopped at.

Q. You bought that whiskey in Dallas, Texas, didn't you?

A. No, sir.

Q. That was Jersey Cream whiskey from Craddock's at Dallas, Texas, wasn't it?

A. No, sir, Mr. Craddock in Dallas, Texas, don't handle Jersey Cream.

Q. How do you know?

A. It is handled in Fort Worth.

Q. How do you know Craddock didn't handle Jersey Cream?

A. Because I tried to buy it from Craddock; asked him if he handled it.

Q. When did you try to buy it from Craddock's?

A. Something like six or eight years, ago, before I moved to Oklahoma.

Q. He handled Hill and Hill, didn't he?

A. Craddock at Dallas ?

Q. Yes.

A. I believe he does; I wouldn't say for sure.

Q. You bought this whiskey at Craddock's in Dallas, didn't you?

A. No, sir.

Q. And you didn't try to bribe Mr. Brents to let you go, going down to Ada, did you?

A. Going down to Ada?

Q. Yes.

A. No, sir, not that I recollect, no sir.

Witness dismissed.

Mr. Lee: That is all.

The Court: Any rebuttal?

Mr. Linebaugh: Call Mr. Barker.

And thereupon L. W. BARKER, being called on behalf of the United States and being duly sworn, upon oath testified as follows:

Direct examination in rebuttal.

By Mr. Linebaugh:

Q. You may state your name.

A. L. W. Barker.

Q. Where do you live?

A. Holdenville, Oklahoma.

Q. Where did you live in August, 1915?

A. At Allen, Okla.

31 Q. What business were you engaged in at that time in Allen?

A. I was in the drug business.

Q. Who were you clerking for?

A. Mr. Greer, J. Knox Greer.

Q. The defendant?

A. Yes, sir.

Q. Do you remember the instance of his arrest on the 30th of August, 1915, by Mr. Bob Duncan and Mr. Ed Brents?

A. Yes, sir.

Q. How long had Mr. Greer been away from Allen at the time he returned on that trip and was arrested there?

A. I think about 10 days.

Cross-examination.

By Mr. Lee:

Q. You say you think about 10 days?

A. Yes, sir.

Witness dismissed.

And thereupon T. E. BRENTS, being recalled, further testified on behalf of the United States, in rebuttal, as follows:

Direct examination.

By Mr. Linebaugh:

Q. Mr. Brents after you started from Allen, where did you take the defendant, after you left Allen? Did you take him in your custody and go somewhere with him?

A. Yes, sir, I took him to Ada and kept him over night there.

Q. On the road from Allen to Ada, I will ask you if he asked you how much you would take to release him on that charge?

A. He did in his place of business at Allen, before I left.

Q. He did in his place of business at Allen, before you left?

A. Yes, sir.

Cross-examination.

By Mr. Lee:

Q. I will ask you, Mr. Brents, if you didn't state in my presence that what Greer said was if you would turn him loose that he would report at any place that you stated?

A. Yes, sir, that was in connection with making his bond. He told me Mr. Whaley turned him loose and let him go on up, and wanted to know why I didn't do it.

Q. And that he would go any place you stated, didn't he?

A. Yes, sir, and I told him I couldn't do it.

32      Redirect examination.

By Mr. Linebaugh:

Q. Just tell the jury what he said about releasing you, not prosecuting him on the charge, if he said anything.

Mr. Denton: We object, if the court please, to his leading the witness.

The Court: Just let the witness state the conversation.

Q. Just state what was said.

A. Shall I state the whole conversation that was had there?

The Court: Any conversation that you had with Greer at that time.

A. Well, sir, I had 64 bottles of cocaine in my possession——

Mr. Lee: If the court please, we object to that.

The Court: The objection is sustained as to that feature. Confine yourself, now, to any statement in regard to whether he made any request as to your turning him loose; that feature of the conversation.

A. Yes, sir, he said if I would turn him loose, he would make it right with me; and I said I can't do it; and he said I suppose I will have to go to jail, and I said that is where you are going.

Recross-examination.

By Mr. Lee:

Q. He wanted to avoid going to jail there, didn't he, Mr. Brents, and was to appear at any place you said, if you wouldn't put him in jail?

A. Yes, sir, he said so.

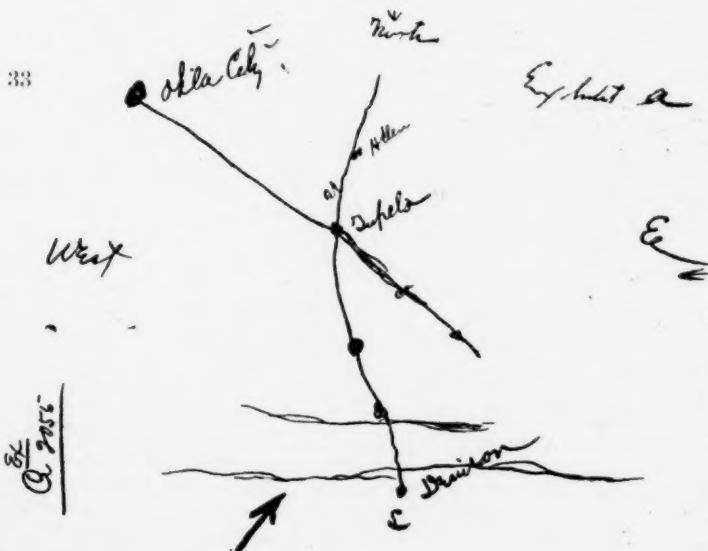
Q. And if you would let him go, didn't he say you could guard him, and he would make it right with you?

A. I don't know that he said anything about my guarding him. All he said, if I would turn him loose he would make it right with me.

Q. And would report at any place you said?

A. Yes, sir, he said he would turn up at any place I said to.

Witness dismissed.



34 The above and foregoing is all the evidence introduced herein.

Mr. Linebaugh: That is our case.

The Court: Proceed with the arguments.

Mr. Denton: If the court please, at this time we move the court to instruct the jury to return a verdict of not guilty.

The Court: Overruled.

Mr. Denton: The defendant excepts.

And thereupon arguments of counsel are made before the jury: and during the progress of arguments of counsel, the noon hour having arrived, court adjourned until 2 o'clock p. m. And thereafter, court having convened pursuant to adjournment, the arguments before the jury herein having been completed, the court charges the jury as follows:

Gentlemen of the jury, in March, 1895, some years before this State of Oklahoma was admitted into the Union and while this portion of the state was what is known as Indian Territory, with which many of you gentlemen are no doubt familiar, Congress passed the following act—at that time Congress was the sole legislative power for the Indian Territory; this act was passed:

That any person, whether an Indian or otherwise, who shall in said Territory manufacture, sell, give away, or in any manner or by any means furnish to anyone, either for himself or another, any vinous, malt, fermented, or intoxicating drinks of any kind, whether medicated or not; or who shall carry or in any manner have carried into said Territory any such liquors or drinks, or who shall be interested in such sale, manufacture, giving away or furnishing to anyone, or carrying into such Territory of of such liquor or drinks, upon conviction thereof, shall be punished as the law provides.

That, I say, was a law which Congress established in 1895, while this was still the Indian Territory, in relation to such liquors as whiskey and beer and that sort of intoxicating drinks. This was the law in its entirety, not only with regard to bringing it in from the outside, but with regard to manufacturing it or selling it or giving it away or otherwise disposing of it within the Indian Territory, up to the time that the State of Oklahoma was admitted into the Union and Indian Territory taken in as a part of that state. At that time by the Enabling Act, which permitted the State of Oklahoma to be organized, it was provided that so much of this law as related to the manufacture and sale or otherwise disposing of such liquors within the state was turned over for enforcement to the state authorities. There was left, however, that feature of the law which related to bringing it in from a point outside of the state into what was formerly Indian Territory and what is now the Eastern District of Oklahoma; that was left as a federal law, cognizable and triable in this the federal court, so that the law as it now stands today, so far as it is still a Federal law, provides that it shall be such offense for anyone to bring from any point outside of the State of Oklahoma into any part of the State of Oklahoma which was formerly Indian Territory any such liquors as whiskey, beer, and that sort of drinks.

It is upon this law as it now stands that the indictment in this case is predicated, and it charges that on the 30th day of August, 1915, the defendant, J. Knox Greer, did carry or cause to be carried from a point outside of the state into Pontotoc County of this state and district, the whiskey about which you have heard evidence in this case.

To this indictment the defendant has entered his plea of not guilty. That puts upon the government the burden of establishing his guilt as charged in the indictment to your satisfaction beyond a reasonable doubt.

The defendant is presumed to be innocent of this charge until his guilt is so established, and that presumption follows him throughout the trial until so overcome.

By a reasonable doubt is meant a real, substantial doubt. If after a fair, candid, careful and impartial consideration of the evidence in this case you have in your minds a fixed and abiding conviction that this defendant is guilty of the charge laid in this indictment, such a conviction as you would act upon in your own more important personal affairs without hesitation, then your minds may be said to be free from any reasonable doubt of his guilt, and, in that event, your verdict should be that of guilty. If on the other hand after such con-

sideration of the evidence you have not in your minds such fixed and abiding conviction of his guilt as charged, then your minds may be said to entertain a reasonable doubt of his guilt, and, in that event, your verdict should be that of not guilty.

It is the theory of the government in this case that this defendant introduced this liquor from Texas. That the whiskey which  
36 was found in the two grips when he was arrested at Allen was—that the two grips, rather, were the same grips which the government's witnesses testified he put upon the train at Denison. It is the theory of the government that those were the same grips and that they contained, when they were put upon the train at Denison, the liquor which was found in them at Allen. Now if the evidence in this case establishes to your satisfaction that those two grips which the defendant put upon the train at Denison were the same two grips that were discovered in his possession by the officers when he was arrested at Allen, that they contained the liquor at Denison, and that he knowingly carried the liquor from Denison up to Allen, then the defendant would be guilty of a violation of the law as charged in this case. If on the other hand, as the defendant contends, the defendant did not bring this liquor from Denison, but, as he says, got it at Tupelo, which was within the Eastern District of Oklahoma, and carried it merely from Tupelo to Allen, he would not be violating the federal law; and he is not being tried here for violating the state law. There has been offered in this case evidence relating to circumstances upon which the government relies as establishing its contention that this defendant brought that liquor from Texas into Allen. Circumstantial evidence is competent evidence in a criminal case, evidence which the jury should consider together with all the other evidence in the case. Where a case depends upon circumstantial evidence, it is necessary that the several circumstances upon which the government relies should be established to the satisfaction of the jury beyond a reasonable doubt and that all the circumstances when so established and taken together should lead conclusively to the guilt of the defendant, and be inconsistent with any other theory. If on a consideration of all the credible evidence in this case you believe it as consistent with the theory of the defendant that he procured the whiskey at Tupelo as with the theory of the government that he brought it from Texas to Allen, then your verdict should be not guilty. It is not a violation of the federal law to carry or cause to be carried whiskey from a point in what was formerly Oklahoma Territory into what was formerly Indian Territory. The facts are for you gentlemen to find in this case.

You are the sole triers of the facts. You take into consideration all the evidence. Upon a consideration of all the evidence, the question for you to determine will be did this defendant put the same two grips upon the train at Denison which were discovered in his possession at Allen. There are certain features of this case about which there is no controversy: The defendant admits and it is conceded  
37 that he had these two grips of liquor when he got off the train at Allen; that the officers made the arrest there. There is no controversy about the liquor and the amount of the liquor,

and the character of the liquor. Now applying to the evidence your judgment as reasonable men, after a fair consideration of it, it will be for you to determine whether under all the circumstances you have a reasonable doubt that the defendant instead of bringing that liquor, as he contends, from Tupelo, brought it from Denison. If after a consideration of all the evidence you find beyond a reasonable doubt—from a consideration of all the evidence, all the circumstances offered in evidence, you find beyond a reasonable doubt that the defendant brought this liquor from Denison to Allen, then he is guilty as charged in this indictment. On the other hand if you do not find that beyond a reasonable doubt, your verdict will be not guilty.

Now it is not necessary for me to say to a jury of this intelligence that it is not a question for the court or jury to determine whether this is a good law or a bad law. It is the duty of us all as good citizens to enforce all laws, and it is not a question for you gentlemen to determine what you think of this law. The only question is, do the facts show that this defendant has violated this law as charged in the indictment. I give the law to you as it stands. The only question left for you is a question of fact. After a consideration of all the evidence, have you in your mind a reasonable doubt, as reasonable men, that the defendant did violate that law. If you have, your verdict will be not guilty. If you have not, your verdict will be guilty.

You are the sole triers of the facts, I say. You have seen and heard the witnesses upon the stand; you have noted their demeanor; their interest or lack of interest in the case, and their manner of testifying. Apply to all these things your judgment as reasonable men, determine where the truth lies, and return your verdict accordingly. When your verdict is arrived at, it will be substantially as follows: (Reads form of verdict.) When your verdict is signed, return it into court.

Mr. Denton: If the court please, I think you have given all the instructions, but, to save the point, I desire to except to the refusal of the court to give instructions insofar as they are not given, instructions 1 to 10, I believe they are.

The Court: The record may so show.

And thereupon a sworn officer retires in charge of the jury, that the jury may consider of its verdict herein.

38      The instructions requested on behalf of the defendant, to which exceptions are asked and allowed by the court, to the refusal of the court to give them in charge to the jury insofar as they may be not covered by the general instructions delivered to the jury by the court, are in words and figures as follows:

"Comes now the defendant, by his attorneys Denton and Lee, and moves the court to instruct the jury as follows, to-wit:

1. You are instructed that the defendant is presumed to be a person of good character, and that that presumption prevails throughout the progress of the trial.

2. You are instructed that the defendant is presumed to be a person of good character, and that that presumption should be considered by you in determining the guilt or the innocence of the defendant.

3. You are instructed that the law presumes the good character of the accused and such presumption is to be considered as evidence in favor of the accused in considering the question of his guilt or innocence.

4. You are instructed that the defendant is presumed to be a person of good character.

5. You are instructed that the accused is presumed to be a person of good character, and that that presumption is to be considered in favor of the accused in considering the question of his guilt or innocence.

6. You are instructed that if all the testimony in this case is as consistent with the theory of the defendant that he procured the whiskey referred to in the indictment from Oklahoma City, Oklahoma, via Tupelo, as with the theory of the government that he brought said whiskey from Texas into what was the Indian Territory, then your verdict in this case should be not guilty.

7. You are instructed that it is not a violation of the federal law to introduce intoxicating liquors into what was the Indian Territory from any point in Oklahoma, situated in what was formerly the Oklahoma Territory.

8. If under all the testimony in this case, it is just as probable that the defendant obtained said whiskey referred to in the indictment, and seized in his possession at Allen, Oklahoma, from the Oklahoma Territory side of the State of Oklahoma, as it is probable that  
39 he obtained said whiskey from outside the State of Oklahoma, then it is your duty to return a verdict of not guilty in this cause.

9. The gist of the offense here is, did the defendant introduce the liquor found in his possession from outside the state?

10. You must find from the evidence beyond a reasonable doubt that the defendant did introduce the said whiskey from outside the state, or your verdict should be not guilty.

11. You are instructed that there is no testimony in this case to contradict the statement of the defendant that he procured the said liquor at Tupelo; and if the said statement of the defendant is a reasonable one under all the evidence in the case, then your verdict should be not guilty.

And thereafter, and upon the same day, the jury returned into court and delivered herein a verdict of guilty, and upon which verdict of guilty the court pronounced judgment against the defendant that he be imprisoned in the United States penitentiary at Leavenworth, Kansas, and pay a fine unto the United States.

And now upon this 5th day of May, 1916, the same being a day within the time heretofore by the court allowed for the preparation, settling, and signing of bill of exceptions herein, comes the defendant, by his attorneys, and prays the court that the above and fore-

going may be settled, signed, and ordered filed as his bill of exceptions herein.

DENTON & LEE,  
*Attys. for Defendant.*

I, D. H. Linebaugh, United States Attorney and representing the United States in the case of United States of America v. J. Knox Greer, No. 2055, do hereby accept service of the above and foregoing bill of exceptions in the above entitled cause, and do hereby agree that said bill of exceptions shall be approved, allowed, and settled, and made a part of the record herein.

May 5th, 1916.

D. H. LINEBAUGH,  
*United States Attorney.*  
By W. P. Z. GERMAN,  
*Sp. Ass't U. S. Atty.*

40 And now upon this 6th day of May, 1916, the court having considered the above and foregoing bill of exceptions, and the same having been heretofore served upon the United States Attorney, there being no suggestions of amendment thereto, and the same being now presented within the time allowance made therefor;

It is by the court ordered that the said Bill of Exceptions be and the same hereby is settled, signed, and allowed as a true, correct, and complete Bill of Exceptions herein, and the same is hereby ordered filed by the clerk of this court and made part of the record herein.

RALPH E. CAMPBELL, *Judge.*

Endorsed: Filed May 6, 1916. R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, thereafterwards, to-wit, on the 6th day of May, A. D. 1916, the defendant filed his Petition for Writ of Error, together with his Assignment of Errors, which Petition for Writ of Error was allowed by the court. Said Petition for Writ of Error, Assignment of Errors and Order allowing Writ of Error are in words and figures as follows:

*Petition for Writ of Error.*

Comes now the said J. Knox Greer, and respectfully shows to the court that on the 7th day of March, 1916, a day of the March 1916 term of this honorable court held at Vinita, in said district, in a certain criminal proceedings then and there pending, he was adjudged guilty of the crime of unlawfully introducing intoxicating liquor into Pontotoc County in the Eastern District of Oklahoma, the same having, prior thereto, been a part of the Indian Territory. That said J. Knox Greer, was, at said term of court, on the 7th day of March, 1916, sentenced to imprisonment in the United States Penitentiary at Leavenworth, Kansas, for the term and period of two years, and to pay a fine in the sum of \$250.

That there is error in the records and proceedings of said court as more fully appears by his assignment of errors presented and filed herewith.

That by the law of the United States he is entitled to have the judgment and sentence aforesaid reviewed on writ of error by the United States Circuit Court of Appeals for the Eighth Circuit.

41 Wherefore said defendant prays that a writ of error may issue in this behalf, returnable to the United States Circuit Court of Appeals for the Eighth Circuit for the correction of the errors so complained of, and that a transcript of the records, proceedings and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals.

DENTON & LEE,  
*Attorneys for Defendant.*

Endorsed: Filed May 6, 1916, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

*Assignment of Errors.*

Comes now John Knox Greer, defendant in the above entitled cause, and presents this, his assignment of errors, as a part of his petition for a writ of error, and respectfully shows that the District Court aforesaid at the trial of the above entitled cause erred in each of the following rulings and holdings, and that manifest errors in the proceedings in this cause were committed by said court in the following respects and upon the following grounds and for the following reasons, to-wit:

1.

Error of the court in permitting the witness, E. L. Pegg, in response to questions propounded by counsel representing the United States to testify under objections of the defendant as to the business in which defendant is and was engaged in August, 1915, which testimony is as follows:

Q. What business is the defendant—was the defendant engaged in at Allen in August, 1915?

Mr. Denton: We object to the question as irrelevant, incompetent and immaterial.

The Court: Overruled.

Mr. Denton: The defendant excepts.

Q. Answer.

A. In the drug business.

2.

Error of the court in overruling demurrer to the evidence made on behalf of defendant at the close of the testimony offered by the government, which demurrer was interposed on the ground

- 42 that such evidence was not sufficient to support the charged contained in the indictment.

3.

Error committed by counsel representing the prosecution in propounding to the defendant while on the witness stand in his own behalf, the following questions:

Q. The principle business you are engaged in up there is selling whisky, isn't it?

4.

Error of the court in permitting counsel for the United States on the trial of said case while defendant was a witness in his own behalf, to cross-examine such witness as follows:

Q. You have been selling whiskey at that drug store from the time you started it up to the present time?

Mr. Denton: Wait.

A. No, sir.

Mr. Denton: Wait a minute. We object as incompetent, irrelevant and immaterial: and not proper cross-examination.

The Court: Overruled.

The defendant excepts.

5.

Error of the United States attorney in propounding to the defendant while a witness on his own behalf the following question:

Q. You have been selling whiskey at that drug store from the time you started it up to the present time.

6.

Error of the court in overruling motion made by counsel for the defendant to instruct the jury to return a verdict of not guilty, which motion was made and so overruled after all the testimony on behalf of the government and the defendant had been introduced.

7.

Error of the court in refusing to give the following instructions to the jury as requested to which the defendant excepted:

- 43 "You are instructed that the defendant is presumed to be a person of good character, and that that presumption prevails throughout the progress of the trial."

## 8.

Error of the court in refusing to give the following instructions to the jury as requested, to which the defendant excepted:

"You are instructed that the defendant is presumed to be a person of good character, and that that presumption should be considered by you in determining the guilt or the innocence of the defendant."

## 9.

Error of the court in refusing to give the following instructions to the jury as requested, to which the defendant excepted:

"You are instructed that the law presumes the good character of the accused and such presumption is to be considered as evidence in favor of the accused in considering the question of his guilt or innocence."

## 10.

Error of the court in refusing to give the following instructions to the jury as requested, to which the defendant excepted:

"You are instructed that the defendant is presumed to be a person of good character."

## 11.

Error of the court in refusing to give the following instructions to the jury as requested, to which the defendant excepted:

"You are instructed that the accused is presumed to be a person of good character, and that that presumption is to be considered in favor of the accused in considering the question of his guilt or innocence."

## 12.

Error of the court in refusing to give the following instructions to the jury as requested, to which the defendant excepted:

44 "You are instructed that if all the testimony in this case is as consistent with the theory of the defendant that he procured the whiskey referred to in the indictment from Oklahoma City, Oklahoma, via Tupelo, as with the theory of the government that he brought said whiskey from Texas into what was the Indian Territory, then your verdict in this case should be not guilty."

## 13.

Error of the court in refusing to give the following instructions to the jury as requested, to which the defendant excepts:

"You are instructed that it is not a violation of the federal law to introduce intoxicating liquors into what was the Indian Territory from any point in Oklahoma, situated in what was formerly the Oklahoma Territory."

14.

Error of the court in refusing to give the following instructions to the jury as requested, to which the defendant excepted:

"If under all the testimony in this case, it is just as probable that the defendant obtained said whiskey referred to in the indictment, and seized in his possession at Allen, Oklahoma, from the Oklahoma Territory side of the State of Oklahoma, as it is probable that he obtained said whiskey from outside the State of Oklahoma, then it is your duty to return a verdict of not guilty in this cause."

15.

Error of the court in refusing to give the following instructions to the jury as requested, to which the defendant excepted:

"The gist of the offense here is, did the defendant introduce the liquor found in his possession from outside the state."

16.

Error of the court in refusing to give the following instructions to the jury as requested, to which the defendant excepted:

45      "You must find from the evidence beyond a reasonable doubt that the defendant did introduce the said whiskey from outside of the state, or your verdict should be not guilty."

17.

Error of the court in refusing to give the following instructions to the jury as requested, to which the defendant excepted:

"You are instructed that there is no testimony in this case to contradict the statement of the defendant that he procured the said liquor at Tupelo; and if the said statement of the defendant is a reasonable one under all the evidence in the case, then your verdict should be not guilty."

Wherefore, the said J. Knox Greer, defendant herein, by reason of the errors aforesaid, prays that said judgment and sentence of the said District Court of the United States in and for the Eastern District of Oklahoma, may be reversed and held for naught.

DENTON AND LEE,

*Attorneys for Defendant.*

Endorsed: Filed May 6, 1916. R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

*Order.*

On the 6th day of May, 1916, came the defendant, J. Knox Greer, by his attorneys, and filed herein and presented to the court, his petition praying for an allowance of a writ of error, and an assignment of errors, intended to be urged by him, praying also, that a transcript of the record, proceedings and papers on which the judgment was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration thereof the court does allow the writ of error, and in view of the fact that defendant, on the 20th day of March, 1916, gave a supersedeas bond herein, in the sum of Five Thousand (\$5,000.00) Dollars, it is ordered that the defendant be not required to give another bond at this time.

RALPH E. CAMPBELL,  
*United States District Judge.*

46      Endorsed: Filed May 6, 1916. R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

*Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judge of the District Court of the United States, for the Eastern District of Oklahoma, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the March Term, 1916, thereof, between the United States of America, plaintiff, and J. Knox Greer, defendant, a manifest error hath happened, to the great damage of the said J. Knox Greer as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things, concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 5th day of July, 1916, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 6th day of May, in the year of our Lord one thousand nine hundred and sixteen.

Issued at office in Muskogee with the seal of the District Court of the United States for the Eastern District of Oklahoma, and dated as aforesaid.

R. P. HARRISON,  
*Clerk of the United States District Court  
for the Eastern District of Oklahoma.*  
By H. E. BOUDINOT, *Deputy.*

[SEAL.]

Allowed by:

RALPH E. CAMPBELL,  
*United States District Judge.*

47

*Return of Writ.*

UNITED STATES OF AMERICA,  
*Eastern District of Oklahoma, ss:*

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of said District Court.

R. P. HARRISON,  
*Clerk of the United States District Court.*  
By H. E. BOUDINOT, *Deputy.*

[SEAL.]

Endorsed: Filed May 6, 1916. R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

*Citation.*

United States of America to United States of America, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date this citation bears date, pursuant to writ of error filed in the clerk's office of the United States District Court for the Eastern District of Oklahoma, wherein J. Knox Greer is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment and sentence rendered against the plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Ralph E. Campbell, Judge of the United States District Court for the Eastern District of Oklahoma, this 6th day of May, A. D. 1916.

RALPH E. CAMPBELL, *Judge.*

I, W. P. Z. German, Asst. U. S. Atty., hereby acknowledge service of the above and foregoing citation on behalf of the United States this 6th day of May, 1916.

W. P. Z. GERMAN,  
*Sp. Ass't to U. S. Atty.*

*Notice and Agreement as to Contents of Printed Transcript.*

You are hereby notified, in accordance with Rule B, Subdivision One, of the rules of this court effective April 1, 1911, that 48 J. Knox Greer, the defendant in the above entitled cause, hereby elects to file in the United States Circuit Court of Appeal a printed transcript of the record in said case, pursuant to the provisions of the Act of Congress of February 13, 1911 (36 Stat. 901).

You are also hereby notified pursuant to Rule C, Subdivision One, of the aforesaid rules, that the defendant, J. Knox Greer, will include in the printed transcript herein to be filed in the United States Circuit Court of Appeals for the Eighth Circuit, the following parts of the record in the above entitled case, to-wit:

1. Indictment.
4. Arraignment of defendant and plea.
5. Record of trial and verdict.
6. Sentence and judgment.
7. Bill of exceptions.
8. Petition for writ of error.
9. Assignment of error.
10. Order allowing writ of error.
11. Writ of error and return thereto.
12. Citation and acceptance of service.
13. Notice and agreement concerning printed transcript.
14. Certificate of clerk.

DENTON & LEE,  
*Attorneys for Defendant.*

*Acknowledgment of Service of Notice.*

The United States of America hereby acknowledges receipt of a copy of the above and foregoing notice of election of the defendant, J. Knox Greer, to file in the United States Circuit Court of Appeals for the Eighth Circuit, a printed transcript of the record in said case; and also of the foregoing statement of the parts of the record in said cause which said defendant will include in his printed transcript herein; and said United States hereby agrees that the printed transcript in said case shall contain a copy of the parts of the record specifically named in said statement, and none other.

Dated this 6 day of May, A. D. 1916.

D. H. LINEBAUGH,  
*United States Attorney,*  
By W. P. Z. GERMAN,  
*Sp. Ass't to U. S. Atty.*

49

Muskogee, Oklahoma.

To the Clerk United States District Court, Eastern District of Oklahoma.

SIR: You will please make up record and have same printed in accordance with the above præcipe and election.

This May 6, 1916.

DENTON & LEE,  
*Attys. for Defendant.*

Endorsed: Filed May 6, 1916. R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

*Certificate of Clerk.*

UNITED STATES OF AMERICA,  
*Eastern District of Oklahoma, ss:*

I, R. P. Harrison, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct transcript of so much of the record in the case of United States of America v. J. Knox Greer, Criminal No. 2055, as was ordered by præcipe of counsel herein to be prepared and authenticated, as the same appears from the records in my office.

I further certify that the writ of error and citation attached hereto, and returned herewith, are the original writ of error and citation issued in this cause.

In testimony whereof I have hereunto set my hand, and affixed the seal of said court at my office in the City of Muskogee, this 20th day of May, 1916.

[SEAL.]

R. P. HARRISON, *Clerk,*  
By H. E. BOUDINOT, *Deputy.*

50 And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

*(Appearance of Counsel for Plaintiff in Error.)*

United States Circuit Court of Appeals, Eighth Circuit.

No. 4719.

J. KNOX GREER, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

To the Hon. John D. Jordan, Clerk of said Court:

SIR: J. C. Denton, and Frank Lee, both of Muskogee, Oklahoma, hereby enter their appearance as Attorneys of Record for J. Knox Greer, Plaintiff in error, in the above styled and numbered cause.

Respectfully,

J. C. DENTON.  
FRANK LEE.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun. 12, 1916.

(*Order of Submission.*)

December Term, 1916.

Thursday, December 14, 1916.

This cause having been called for hearing in its regular order, was submitted on brief in behalf of plaintiff in error and argued by Mr. C. W. Miller for defendant in error.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

51

(*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1916.

No. 4719.

J. KNOX GREER, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Oklahoma.

Mr. James C. Denton and Mr. Frank Lee filed brief for plaintiff in error.

Mr. C. W. Miller, Special Assistant to the United States Attorney (Mr. D. H. Linebaugh, United States Attorney, and Mr. W. P. McGinnis, Special Assistant to the United States Attorney, on the brief), for defendant in error.

Before Hook and Smith, Circuit Judges, and Amidon, District Judge.

SMITH, *Circuit Judge*, delivered the opinion of the Court.

The plaintiff in error was indicted charged with carrying liquors into what was formerly Indian Territory from without the State of Oklahoma in violation of the Act of Congress of March 1, 1895, 28 Stats. 693, 697. He was tried, convicted and sentenced and sued out a writ of error. He files three specifications of error:

"(1) Error of the court in permitting counsel representing the prosecution to propound to plaintiff in error the questions and answers set forth in assignments 3, 4 and 5.

"(2) Error of the court in overruling motion made by counsel for the plaintiff in error to instruct the jury to return a ver-

52 dict of not guilty, which motion was made and so overruled after all the testimony on behalf of the government and the defendant had been introduced.

"(3) Error of the court in refusing to give in charge to the jury the instructions as requested in assignment of errors 7, 8, 9, 10 and 11."

The defendant was a witness in his own behalf and testified that at the time of the trial he was in the bus and baggage business in Oklahoma City, but at about the time of his arrest for this alleged crime he was in the drug business at Allen, Oklahoma. On his cross-examination the following took place:

"Q. Did you have any business at Oilton?"

A. At Oilton, yes, sir.

Q. What business were you engaged in up there?

A. I have a house there—built a house there this summer.

Q. The principal business you are engaged in up there is selling whiskey, isn't it?

A. No, sir.

Mr. Lee: We object to that and we take exception to the question.

Mr. Linebaugh: I think counsel went into that, if the court please.

The Court: He has answered it."

The third assignment of error is to the propounding of this question:

"The principal business you are engaged in up there is selling whiskey, isn't it?"

The cross-examination continued:

"Q. Now you have been in the whiskey business at Allen ever since you have been there, haven't you, Greer?"

A. No, sir.

Q. Have you been convicted in the courts of Pontotoc county for whiskey—selling whiskey?

A. Yes, sir.

Q. Charges pending against you there now for selling whiskey?

53 Mr. Denton: Wait. We object, if the court please, as to any charges.

The Court: Sustained.

Q. You have been selling whiskey at that drug store from the time you started it up to the present time?

Mr. Denton: Wait.

A. No, sir.

Mr. Denton: Wait a minute. We object as incompetent, irrelevant, and immaterial; and not proper cross-examination.

The Court: Overruled.

Mr. Denton: The defendant excepts."

The fourth and fifth assignments of error are based upon the propounding of the question, "You have been selling whiskey at that drug store from the time you started it up to the present time?"

It would seem that when a defendant says he was running a drug store and admits upon being questioned without objection that he had been convicted of selling whiskey he was not prejudiced by these questions especially in view of the fact that he wholly denied the charge impliedly made by them and no effort was made to rebut his testimony on that subject.

There is no merit in the third assignment of error because there was no proper objection.

In *Davidson S. S. Co. v. United States*, 142 Fed. 315, this court said:

"It has been held by this court many times that a trial court is justified in overruling an objection to a question, or to the evidence sought to be elicited thereby, when no ground is specified, or when the ground mentioned is so general in form as to be insufficient to direct attention to the particular defect or objectionable feature relied on."

Judge Hook then cited numerous authorities to that effect from this court but to have cited all the authorities to the same effect in other Federal and in the State Courts would have been impossible for they are innumerable. This case went to the Supreme Court, *Davidson S. S. Co. v. United States*, 205 U. S. 187, but in that court this question was not even raised. Having answered this question without legal objection it would follow that there was no merit in the fourth and fifth assignments.

The defendant claiming he was in a wholly legitimate business, that of handling a bus and baggage, practically admitted and apparently from the undisputed evidence had been in the drug business at Allen. The drug business is as legitimate as any known but it is notorious that in the prohibited territory it is often conducted in connection with the illicit business in intoxicating liquors. He was charged with carrying liquor into Allen from without the State. If he was in fact selling whiskey in his drug store that made it necessary for him to receive it from some source. True he might have bought it in what was formerly Indian Territory but that would have been in violation of the constitutional provision of Oklahoma enacted pursuant to the provisions of Subdivision second of Section 3 of the Enabling Act of Oklahoma, 34 Stats. 267, 269. The defendant had not only bought liquors in Indian Territory in violation of law or had bought them without the State of Oklahoma and carried them into Indian Territory in violation of law but had sold them and been convicted upon a plea of guilty. He claimed he had bought seventeen quarts of whiskey for his own consumption and so testified in chief. On cross-examination this was sought to be shaken by showing that he had been selling liquors constantly in his store. In view of this thought he was on cross-examination asked the question as to whether he had been so selling them and the court overruled a sufficiently specific objection. Before the objection could be made he answered the question, "No, sir." It is gravely doubtful whether

under these circumstances the question was not admissible. He answered the question favorably to himself and there was no effort to rebut his testimony. If this were a civil case and the witness not a party it is conceded the party in whose favor he answered it could not successfully assign the ruling as error. *Short v. United States*, 221 Fed. 248. In general the rules of evidence in criminal and civil cases are the same. *United States v. Gooding*, 12 Wheat. 460, 467;

Thompson v. Bowie, 4 Wall. 463, 472; *Nudd v. Burrows Assignee*, 91 U. S. 426, 438. In *Thompson v. Bowie*, supra, the court quoted from *Abbott, Justice*, with approval.

"There is no difference as to the rules of evidence between criminal and civil cases; what may be received in the one may be received in the other, and what is rejected in the one ought to be rejected in the other."

In *Fitzpatrick v. United States*, 178 U. S. 304, 315, the court said:

"Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts. \* \* \* Indeed, we know of no reason why an accused person, who takes the stand as a witness, should not be subject to cross-examination as other witnesses are."

In *Sawyer v. United States*, 202 U. S. 150, 165, the Supreme Court said:

"It has been held in this court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution has the right to cross-examine him upon his evidence in chief with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime." See, *Caminetti v. United States*, — U. S. —. It is manifest that there is nothing in these assignments in view of the clear and specific answers of the defendant of "No, sir."

In argument the plaintiff in error seems to rely upon the repetition of these questions as misconduct upon the part of the Government's counsel. We shall not hesitate in a proper case to direct a new trial upon misconduct of the character suggested but no objection on this ground was made in the court below and it cannot be raised here for the first time and especially in view of the  
56 doubt as to whether the evidence was not admissible and of the answer of the defendant to the questions objected to and the failure to offer to rebut his answer, and the subject will not be further considered here.

Passing now to the second specification of errors which is based upon the overruling of the motion to instruct the jury to return a verdict of not guilty, the evidence showed that on the day in question the defendant got upon the train of the Missouri, Oklahoma

& Gulf Railroad at Denison, Texas, ticketed to Allen, Oklahoma; that he carried a couple of suit-cases; that he got off the train at Allen and was immediately arrested; the suit-cases were taken to his store at Allen and opened; that one contained twelve quarts of whiskey and the other ten pints of whiskey. It is true the defendant testified that the two suit-cases with which he got on the train at Denison were not the same two with which he got off at Allen; that one of those he put on the train at Denison he put on for an unnamed lady and left it in her custody; that he bought this whiskey at Tupelo on the way from Denison to Allen of a man named "Red" whose surname he understood was Phillips with whom he had an arrangement to deliver the whiskey through an intermediary of unknown name. This explanation by the defendant was for the jury to consider and it evidently determined that it was not true. In the absence of this evidence there was certainly abundance of evidence to justify a verdict for the United States and we are satisfied the court had no right to assume that the defendant's evidence so overcame the evidence of the United States as to justify a directed verdict.

Turning now to the last specification of error we shall consider only the fourth instruction asked:

"You are instructed that the defendant is presumed to be a person of good character."

In *Chambliss v. United States*, 218 Fed. 154, the writer of this opinion said in effect that this instruction should have been given. The same court that sat in *Chambliss v. United States* sat in the case of *Price v. United States*, 218 Fed. 149. The latter case was decided three days after the *Chambliss* case and the majority of the court held that there is no presumption that the character of the  
57 defendant in a criminal case is good. The writer in concurring in the *Price* case said:

"My views of the subject considered in the foregoing opinion are quite fully expressed in *Chambliss v. United States of America*, *infra*, 132 C. C. A. 1, and I simply concur in the result in the foregoing opinion."

This amounted to a dissent from the opinion in the *Price* case and to that dissent I still adhere with all possible respect to my associates on the court. I think this case should therefore be reversed upon this question but the majority of the court are still of the opinion that the case of *Price v. United States*, 218 Fed. 149, correctly announces the law and this point will therefore have to be overruled.

The case is Affirmed.

Filed February 24, 1917.

58

*(Judgment.)*

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1916.

Monday, February 26, 1917.

No. 4719.

J. KNOX GREER, Plaintiff in Error.

VS.

UNITED STATES OF AMERICA.

In Error to the District Court of the United States for the Eastern District of Oklahoma.

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

It is further ordered that the defendant below, J. Knox Greer, do surrender himself to the custody of the United States Marshal for the Eastern District of Oklahoma in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

February 26, 1917.

59

*(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma as prepared, printed and certified by the Clerk of said District Court to the United States Circuit Court of Appeals in pursuance of the Act of Congress, approved February 13, 1911, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein J. Knox Greer was Plaintiff in Error and United States of America was Defendant in Error, No. 4719, as full, true and complete as the originals of the same remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this thirteenth day of April, A. D. 1917.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,

*Clerk of the United States Circuit Court  
of Appeals for the Eighth Circuit.*

60 In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 4719.

J. KNOX GREER, Plaintiff in Error,

v.

UNITED STATES OF AMERICA, Defendant in Error.

*Stipulation of Counsel as to Return to Writ of Certiorari.*

It is hereby stipulated and agreed by and between J. Knox Greer, plaintiff in error, through his attorneys, James C. Denton and Frank Lee of Muskogee, Oklahoma, and the United States of America, defendant in error, through John W. Davis, Solicitor General, in the above entitled cause, that the certified transcript of the record in this cause filed on May 12, 1917, in the Supreme Court of the United States, and docketed as J. Knox Greer, Petitioner, v. United States of America, Respondent, No. 1126, shall be taken as a return to the writ of certiorari issued out of the Supreme Court of the United States on June 11, 1917, to the United States Circuit Court of Appeals for the Eighth Circuit in this cause.

J. KNOX GREER,

By JAMES C. DENTON,  
FRANK LEE,

*His Attorneys.*

UNITED STATES OF AMERICA,

By JOHN W. DAVIS, *Solicitor General.*

(Endorsed:) No. 4719. J. Knox Greer, Plaintiff in Error, v. United States of America, Defendant in Error. Stipulation of counsel as to return to Writ of Certiorari. Filed Jul-2, 1917. E. E. Koch, Clerk.

61 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which J. Knox Greer is plaintiff in error, and the United States of

America is defendant in error, No. 4719, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of Oklahoma, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby commend you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eleventh day of June, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,

*Clerk of the Supreme Court of the United States.*

[Endorsed:] 504-17 25956. File No. 25,956. Supreme Court of the United States, October Term, 1916. No. 1126. J. Knox Greer vs. The United States. Writ of Certiorari. Filed June 15, 1917. E. E. Koch, Clerk.

*Return to Writ.*

UNITED STATES OF AMERICA,  
*Eighth Circuit, ss:*

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of J. Knox Greer, Plaintiff in Error, vs. United States of America, No. 4719, is a full, true and complete transcript of all the pleadings, proceedings and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this seventh day of July, A. D. 1917.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,

*Clerk of the United States Circuit Court  
of Appeals for the Eighth Circuit.*

[Endorsed:] File No. 25,956. Supreme Court U. S., October Term, 1917. Term No. 504. J. Knox Greer, Petitioner, vs. The United States. Writ of Certiorari & Return. Filed July 9th, 1917.

# In the Supreme Court of the United States.

OCTOBER TERM, 1917.

---

J. KNOX GREER, PETITIONER,	} No. 504.
v.	
THE UNITED STATES.	

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

---

## **MOTION BY THE UNITED STATES TO ADVANCE.**

Comes now the Solicitor General and respectfully moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

Petitioner was convicted in the District Court of the United States for the Eastern District of Oklahoma for introducing intoxicating liquors into that part of Oklahoma which was formerly Indian Territory, and sentenced to two years in the Federal penitentiary at Leavenworth, Kans., and to pay a fine of \$250. Judgment was affirmed by the Circuit Court of Appeals for the Eighth Circuit.

The case presents the question whether an accused is of right entitled to an instruction to the jury to the effect that he is presumed to be a person of good character.

There is conflict in the decisions of the Circuit Courts of Appeals on the question. For this reason as well as the prompt enforcement of the criminal statutes an early determination by this court is desirable.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,  
*Solicitor General.*

OCTOBER, 1917.

○

IN THE SUPREME COURT OF THE UNITED STATES.  
*October Term, 1916.*

\_\_\_\_\_  
No. \_\_\_\_\_  
\_\_\_\_\_

J. KNOX GREER, - - - - - *Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA, - - - *Respondent.*

\_\_\_\_\_

**PETITION FOR WRIT OF CERTIORARI.**

*To the Honorable Supreme Court of the United States:*

The petition of J. Knox Greer respectfully shows to this Honorable Court as follows, to-wit:

1. That on November 12, 1915, petitioner was indicted by a grand jury in the United States District Court for the Eastern District of Oklahoma for introducing intoxicating liquor into that part of the State of Oklahoma which was formerly the Indian Territory, in violation of section 8 of the Act of Congress of March 1, 1895, 28 Stat. 697 (Tr., p. 2).

2. That thereafter on March 7, 1916, petitioner was tried by a jury in said District Court and convicted of said charge and sentenced to serve a term of two years in the United States

Penitentiary at Leavenworth, Kansas, and to pay a fine of \$250.00 (Tr., pp. 2 and 3).

3. That thereafter on the 6th day of May, 1916, petitioner sued out a writ of error to have said judgment reviewed by the United States Circuit Court of Appeals for the Eighth Circuit (Tr., p. 46).

4. That thereafter on February 26, 1917, the judgment and sentence of the said District Court was duly affirmed by the United States Circuit Court of Appeals for the Eighth Circuit (Tr., p. 56).

5. That a certified copy of the entire record of said case in the said Circuit Court of Appeals is hereby furnished, attached to and made a part of this application, and marked Exhibit "A" in compliance with Rule 37 of this Honorable Court.

6. That your petitioner is advised and believes that the said judgment of the United States Circuit Court of Appeals in said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provision in section 240, Judicial Code, said case being made final in said Circuit Court of Appeals for the Eighth Circuit by the provision in section 128, Judicial Code.

7. That the said judgment of conviction against petitioner was affirmed by a divided court (Tr., pp. 51 to 56), Hook, Circuit Judge, and AMIDON, District Judge, concurring, and SMITH, Circuit Judge, dissenting on the ground that the Dis-

trict Court committed reversible error in refusing to instruct the jury, on the written request of the petitioner, that petitioner was "presumed to be a person of good character."

8. Your petitioner further shows to this Honorable Court that in the trial of said case in the said District Court, petitioner offered no evidence in support of or bearing upon his character (Tr., pp. 5 to 34, inclusive). That at the conclusion of all the evidence, your petitioner, in writing, requested said District Court to instruct the jury that he is presumed to be a person of good character (Tr., p. 38), which instruction was denied and an exception taken to the ruling of the court thereon (Tr., p. 37).

9. Your petitioner further shows to this Honorable Court that this case presents the question of law whether a defendant on trial in a Federal Court, where no evidence is offered by said defendant or by the United States in support of or bearing upon defendant's character, is entitled, upon a seasonable request made in writing, to have the jury instructed that he is presumed to be a person of good character. That this question was first presented to the United States Circuit Court of Appeals for the Eighth Circuit in the case of *Price v. United States*, 218 Fed. 149, and of *Chambliss v. United States*, 218 Fed. 154. That the judges sitting in the trial of the last mentioned cases were HOOK, Circuit Judge; SMITH, Circuit Judge, and AMIDON, District Judge, who also decided the present case. That in the *Price* and *Chambliss* cases, *supra*, the said United States Circuit Court of Appeals likewise affirmed the judgment of conviction below by a divided opinion as to this

same question, in which opinion HOOK, Circuit Judge, and AMIDON, District Judge, concurred, and SMITH, Circuit Judge, dissented, the majority of the court holding that a presumption of good character in such a case does not exist, and Smith, Circuit Judge, being of the opinion that such a presumption does exist.

10. Your petitioner further shows to this Honorable Court that this same question has been decided by the United States Circuit Court of Appeals for the Sixth Circuit in the case of *Mullen v. United States*, 106 Fed. 892, contrary to the three decisions rendered by the United States Circuit Court of Appeals for the Eighth Circuit in the said *Price*, *Chambliss* and *Greer* cases. That in the *Mullen* case, *supra*, the United States Circuit Court of Appeals for the Sixth Circuit held that "in a criminal trial in a Federal Court, where no testimony has been offered as to the previous character of the accused, a presumption of good character exists in his favor, of which, upon a request therefor, the jury should be instructed." And that the decision in the *Mullen* case was a unanimous one, the judges sitting being Mr. Justice DAY, then Circuit Judge, the late Mr. Justice LURTON, then Circuit Judge, and TAFT, Circuit Judge.

11. Your petitioner further shows to this Honorable Court that the decision of the United States Circuit Court of Appeals for the Eighth Circuit in the said *Price* and *Chambliss* cases and in the present case is contrary to the views expressed by the United States Circuit Court of Appeals for the Fifth Circuit in *Lowden v. United States*, 149 Fed. 673.

12. Your petitioner further shows to this Honorable Court that the decision of the United States Circuit Court of Appeals for the Eighth Circuit in the said *Price* and *Chambliss* cases and in the present case is contrary to the views expressed by the United States Circuit Court of Appeals for the Fourth Circuit in *Garst v. United States*, 180 Fed. 339, 344.

13. Your petitioner further shows to this Honorable Court that the decision of the United States Circuit Court of Appeals for the Eighth Circuit in the said *Price* and *Chambliss* cases and in this case is contrary not only to the rule of law heretofore followed in the Fourth, Fifth and Sixth Circuits, as above stated, but is contrary to the rule of law stated in the following text books and works on Evidence:

Third Encyclopedia of Evidence, p. 34;

Ninth Encyclopedia of Evidence, p. 927;

Jones on Evidence (2nd ed.), p. 178;

Wharton's Criminal Evidence (9th ed.), Secs. 57, 62;

Wharton's Criminal Evidence (10th ed.), Sec. 57;

Note, 20 L. R. A., p. 609;

1 Bishop on Criminal Procedure (2nd ed.), Sec. 1062;

Bishop's New Criminal Procedure (4th ed.), Secs. 1112, 1119;

Lawson's Law of Presumptive Evidence (2nd ed.), p. 520;

3 Rice on Evidence, p. 597;

Underhill on Criminal Evidence (2nd ed.), Sec. 76.

14. Your petitioner further shows to this Honorable Court that the question whether a defendant in a criminal case

in a Federal Court is entitled, where no evidence has been offered as to his previous character, to have the jury instructed that he is presumed to be a person of good character, has never, so far as counsel are aware, been presented to, and decided by, this Honorable Court. That the question, in view of the conflict in the decisions in the Eighth, Sixth, Fifth and Fourth Circuits, is one which should be finally determined by this Honorable Court to secure uniformity of decision, regardless of the interests of your petitioner in the present case, or of whether this Honorable Court shall eventually affirm the decision of the United States Circuit Court of Appeals for the Eighth Circuit in this case, or shall overrule the same and announce the rule of law to be that adhered to by the United States Circuit Courts of Appeal for the Fourth, Fifth and Sixth Circuits.

*Wherefore*, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, entitled *J. Knox Greer v. United States of America*, No. 4719, to the end that the said case may be reviewed and determined by this court as provided by section 240, Judicial Code, or that your petitioner may have such other and further relief or remedy in the premises as this court may deem appropriate and in conformity with said provision of the Judicial Code and

that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

J. KNOX GREER,  
*Petitioner;*

By JAMES C. DENTON,  
FRANK LEE,

*State of Oklahoma, County of Muskogee—ss.*

James C. Denton, being first duly sworn, on oath states that he is one of the counsel for the petitioner, J. Knox Greer, in the above entitled cause, that he prepared the above and foregoing petition for writ of *certiorari*, and that the facts therein stated are true to the best of his knowledge and belief.

JAMES C. DENTON,

Subscribed and sworn to before me this 19th day of April,  
A. D. 1917.

R. P. HARRISON,  
*Clerk U. S. District Court for  
the Eastern Dist. of Oklahoma.*

(Seal)

By D. F. DICKEY, *Deputy.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1916.

---

J. KNOX GREER, PETITIONER,	} No. 1126.
v.	
THE UNITED STATES.	

---

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT.**

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION.**

Petitioner asks for the issuance of the extraordinary writ of certiorari because of the refusal of the trial judge to give an instruction to the jury requested by the petitioner to the effect that petitioner "was presumed to be a person of good character."

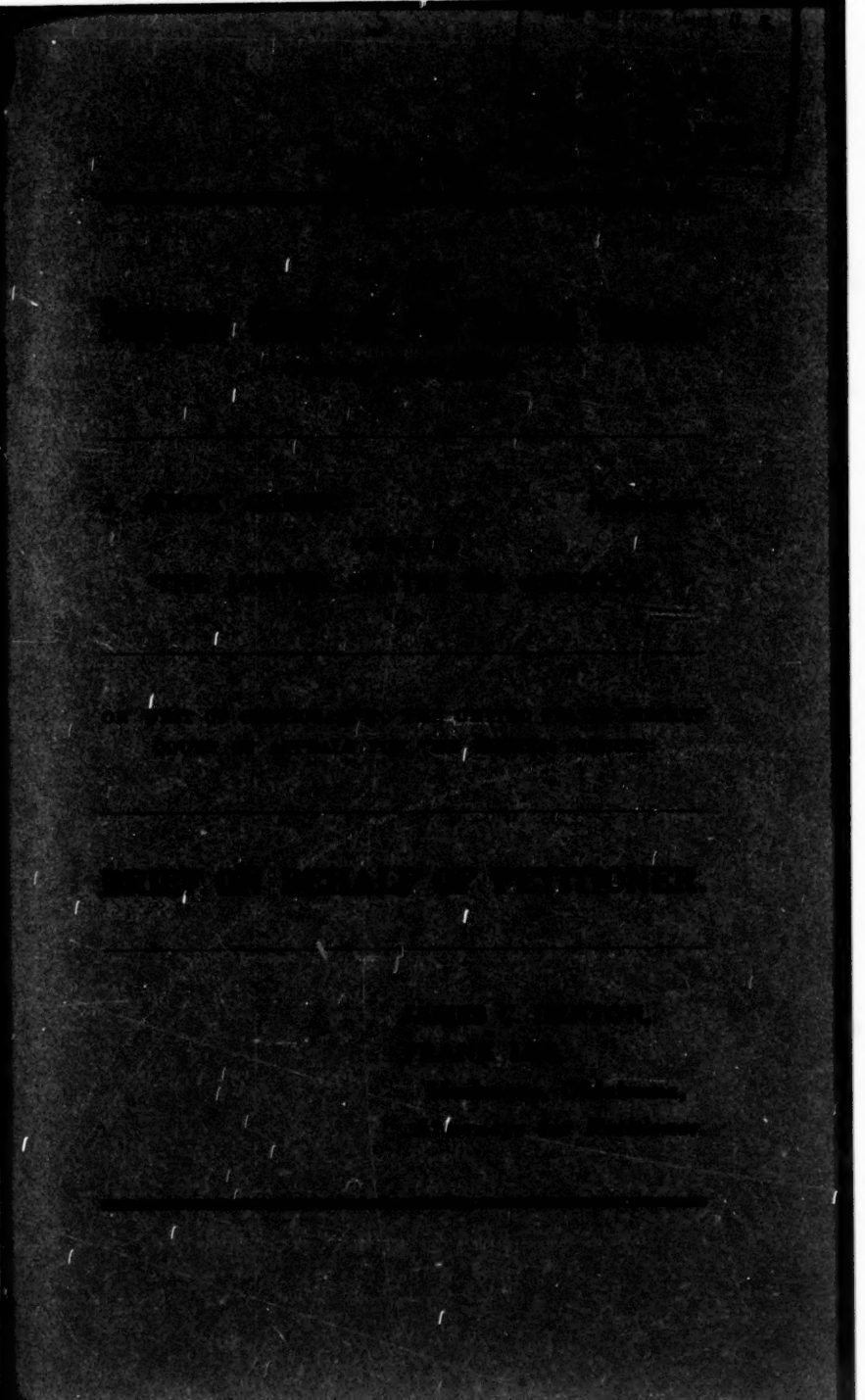
But it is not pointed out that such refusal in any wise operated to petitioner's prejudice, nor is there any objection that petitioner was not accorded a fair and impartial trial. It is true that there is conflict in the decisions of the Circuit Courts of Appeals as outlined in petitioner's application, but the refusal in this case can be said to have been nothing more than mere error for the correction of which the writ of certiorari will not be used by this court. See *United States v. Dickinson*, 213 U. S. 92, 102.

An additional reason for denying the writ in this case lies in the fact that even though this error be open to review on certiorari, it presents no question of gravity or general importance. *Fields v. United States*, 205 U. S. 292; *Heike v. United States*, 227 U. S. 131, 144.

JOHN W. DAVIS,  
*Solicitor General.*

MAY, 1917.





# INDEX.

STATEMENT OF THE CASE .....	[pages 1
SPECIFICATION OF ERRORS .....	4

## PROPOSITION.

IN A CRIMINAL TRIAL IN THE FEDERAL COURT, WHERE NO TESTIMONY HAS BEEN OFFERED AS TO THE PREVIOUS CHARACTER OF THE ACCUSED, A PRESUMPTION OF GOOD CHARACTER EXISTS IN HIS FAVOR, OF WHICH, UPON A REQUEST THEREFOR, THE JURY SHOULD BE INSTRUCTED ..... 5

POINT 1. The text writers almost unanimously support the rule that a defendant in a criminal trial, whether in a state or a federal court, where no evidence has been offered touching upon character, is presumed to be a person of good character ..... 8

POINT 2. The decisions of the Supreme Courts of a majority of the States of the Union support the contention that the defendant, in the absence of evidence touching upon character, is presumed to be a person of good character ..... 23

POINT 3. The decisions of the federal courts have uniformly recognized the existence of a presumption of ~~innocence~~ *good character,* with the exception of the decisions of the Eighth Circuit Court of Appeals in the cases of Chambliss v. United States, 218 Fed. 154, Price v. United States, 218 Fed. 149, and in the present case ..... 59

POINT 4. The rule of the common law in force at the time of the adoption of the judiciary act of 1789 controls as to all questions of evidence in criminal trials in the federal courts, and under the common law the defendant in a criminal case, where no evidence was offered on the subject, was presumed to be a person of good character ..... 82

POINT 5. Irrespective of general authority and of the common rule, sound reason and public policy require that a defendant be presumed to be a person of good character in a criminal trial in the federal court, in the absence of evidence of good character ..... 84

# INDEX--CONTINUED.

## TABLE OF CASES.

	[pages
Ackley v. People, 9 Barb. 609 .....	43
Addison v. People, 62 N. E. 235 .....	9
Bennett v. State, 86 Ga. 401 .....	9, 28
Benson v. U. S., 146 U. S. 334 .....	82
Blester v. State, 31 N. W. 416 .....	40
Chambliss v. U. S., 21 Fed. 154 .....	60, 81
Christopoulo v. U. S., 230 Fed. 788 .....	76
Cluck v. State, 40 Ind. 263 .....	29
Coffin v. U. S., 156 U. S. 432 .....	84
Danner v. State, 54 Ala. 127 .....	9, 11
Donnelly v. U. S., 228 U. S. 343 .....	82
Donoghoe v. People, 6 Park. Cr. R. 120 .....	34
Dryman v. State, 102 Ala. 130 .....	9
Edgington v. U. S., 164 U. S. 361 .....	84
Fields v. U. S., 27 App. D. C. 433 .....	79
Fletcher v. State, 49 Ind. 124 .....	30
Garst v. U. S., 180 Fed. 339 .....	73
Gater v. State, 141 Ala. 10 .....	9
Goggans v. Monroe, 31 Ga. 331 .....	9, 27
Griffin v. State, 165 Ala. 29 .....	9
Haynes v. State, 17 Ga. 465 .....	9
Hitchcock v. Moore, 14 Am. St. R. 474 .....	36
Howard v. Commonwealth, 70 S. W. 1055 .....	34
Knight v. State, 70 Ind. 375 .....	48
Little v. State, 58 Ala. 265 .....	9
Lowdon v. U. S., 149 Fed. 673 .....	71
Logan v. U. S., 144 U. S. 263 .....	82
Mullen v. U. S., 106 Fed. 892 .....	50, 65, 84
McKnight v. U. S., 97 Fed. 208 .....	60
Newsom v. State, 107 Ala. 133 .....	9
Olive v. State, 7 N. W. 444 .....	39
People v. Bodine, 1 Denio 281 .....	32, 41
People v. Evans, 40 N. W. 473 .....	37
People v. Fair, 42 Cal. 137 .....	25
People v. Gleason, 55 Pac. 123 .....	27

# INDEX—CONTINUED.

	[pages
People v. Johnson, 61 Cal. 142 .....	48
People v. Lingley, 46 L. R. A. (N. S.) 342 .....	47
People v. Vane, 12 Wend. 78 .....	33
People v. Weiss, 114 N. Y. S. 236 .....	45
People v. White, 24 Wend. 520 .....	41
Price v. U. S., 218 Fed. 149 .....	60, 81
Rowe v. U. S., 97 Fed. 779 .....	84
State v. Garrand, 5 Or. 216 .....	57
State v. Kabrich, 39 Iowa 277 .....	31
State v. McAllister, 24 Me. 139 .....	33, 35
State v. O'Neal, 7 Iredell 251 .....	32
State v. Roupetz, 85 Pac. 778 .....	34
State v. Upham, 38 Me. 261 .....	35
Stephens v. State, 20 Tex. App. 255 .....	58
U. S. v. Breese, 131 Fed. 915 .....	69
U. S. v. Guthrie, 171 Fed. 528 .....	70
U. S. v. Neverson, 1 Mackey 152 .....	60
U. S. v. Reid, 53 U. S. 361 .....	82
White v. U. S., 164 U. S. 100 .....	74



*In the*  
**SUPREME COURT OF THE UNITED STATES.**  
*October Term, 1917.*

---

No. 504.

---

**J. KNOX GREER, - - - - - Petitioner,**

***vs.***

**THE UNITED STATES OF AMERICA.**

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

---

**BRIEF *on* BEHALF *of* PETITIONER.**

---

**Statement of the Case.**

The petitioner, J. Knox Greer, was on November 12, 1915, indicted by a grand jury in the United States District Court for the Eastern District of Oklahoma, for introducing intoxicating liquor into that part of the State of Oklahoma which was formerly the Indian Territory from without said state, in violation of section 8 of the Act of Congress of

March 1, 1895, 28 Stat. 697 (Tr., p. 2). Thereafter on March 7, 1916, petitioner was tried, convicted and sentenced to serve a term of two years in the United States Penitentiary at Leavenworth, Kansas, and to pay a fine of \$250.00 (Tr., pp. 3 and 4).

The case was taken by writ of error to the United States Circuit Court of Appeals for the Eighth Circuit (Tr., p. 45); and on February 26, 1917, the Circuit Court of Appeals affirmed the judgment of the District Court (Tr., p. 54), pursuant to an opinion filed on February 24, 1916 (Tr., p. 49), and which opinion is reported in 240 Fed. 320.

Thereafter the petitioner brought the case to this honorable court for review on a writ of *certiorari* issued on June 11, 1917 (Tr., p. 55), pursuant to section 240 of the Judicial Code.

In the trial of the case in the District Court, the petitioner offered no evidence bearing upon, or in support of, his character (Tr., pp. 5-35, inc.). The petitioner testified in his own behalf; and on cross examination the United States Attorney, over objections of counsel, propounded a series of questions which had the effect, in counsel's opinion, of imputing bad character to the petitioner (Tr., p. 27). Accordingly, to prevent the jury from drawing any such inference, at the close of all the evidence, the petitioner, in writing, requested the court to instruct

the jury that he was presumed to be a person of good character, there being five separate and distinct requests on the subject, as follows, to-wit:

"1. You are instructed that the defendant is presumed to be a person of good character, and that that presumption prevails throughout the progress of the trial.

"2. You are instructed that the defendant is presumed to be a person of good character, and that that presumption should be considered by you in determining the guilt or the innocence of the defendant.

"3. You are instructed that the law presumes the good character of the accused and such presumption is to be considered as evidence in favor of the accused in considering the question of his guilt or innocence.

"4. You are instructed that the defendant is presumed to be a person of good character.

"5. You are instructed that the accused is presumed to be a person of good character, and that that presumption is to be considered in favor of the accused in considering the question of his guilt or innocence." (Tr., p. 38.)

All of these requests were denied by the District Court (Tr., p. 38), the petitioner taking an exception to the court's denial of each request (Tr., p. 38).

### **SPECIFICATION of ERRORS.**

Accompanying the petition for writ of error, the petitioner filed an assignment of seventeen errors (Tr., pp. 41-44, inc.). The rulings of the District Court in refusing the instructions requested as above set out are complained of in paragraphs 7 to 11, inclusive, of the assignment of errors (Tr., p. 43). These assignments all raise in different form the question whether a defendant in a criminal trial in the Federal Court, where no evidence is offered in support of or bearing upon his character, is entitled, upon a seasonable request made in writing, to have the jury instructed that he is presumed to be a person of good character. This question was answered in the negative by the District Court in refusing to give the instructions requested by the petitioner. And the District Court's ruling thereon was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit by a divided court, Hook, Circuit Judge, and AMMON, District Judge, concurring, and SMITH, Circuit Judge, dissenting (Tr., pp. 49-53, inc.). The question raised will be discussed under the following proposition:

“In a criminal trial in a Federal Court, where no testimony has been offered as to the previous character of the accused, a presumption of good character exists in his favor, of which, upon a request therefor, the jury should be instructed.”

**PROPOSITION.**

---

**IN A CRIMINAL TRIAL IN THE FEDERAL COURT, WHERE NO TESTIMONY HAS BEEN OFFERED AS TO THE PREVIOUS CHARACTER OF THE ACCUSED, A PRESUMPTION OF GOOD CHARACTER EXISTS IN HIS FAVOR, OF WHICH, UPON A REQUEST THEREFOR, THE JURY SHOULD BE INSTRUCTED.**

At the trial in the District Court the petitioner offered no evidence bearing upon or in support of his character (Tr., pp. 5-35, inc.). The petitioner, however, testified in his own behalf (Tr., pp. 19-32, inc.). On cross examination the United States Attorney, over numerous objections, made what counsel believe was an unwarranted attempt to induce the jury to infer that the petitioner's character was bad by the following line of questioning: "The principal business you are engaged in up there is selling whiskey, isn't it?" referring to Oilton, Oklahoma, some 120 miles north by rail from Allen, Oklahoma, the place where petitioner lived, was running a drug store and was arrested; "Now, you have been in the whiskey business at Allen ever since you have been there, haven't you, Greer?" "Have you been convicted in the courts of Pontotoc County for whiskey

—selling whiskey?” “Charges pending against you there now for selling whiskey?” and, “You have been selling whiskey at that drug store from the time you started it up to the present time?”

Now the crime charged was a statutory one, not involving intent as a material ingredient; and the gist of it was whether the petitioner introduced the liquor found in his possession at Allen, Oklahoma, where he lived, from outside said state. Hence, we submit that the questions above set out were incompetent, irrelevant and immaterial, and not proper cross examination of the petitioner; and constituted an unwarranted attempt to induce the jury to believe that petitioner was a person of bad character.

Therefore, on the assumption that the petitioner was presumed to be a person of good character, and the further assumption especially that the Government could not attempt to prove the petitioner's character bad until some evidence touching upon his character had been offered, at the close of all the evidence in writing requested the District Court to instruct the jury as follows, to-wit:

“1. You are instructed that the defendant is presumed to be a person of good character, and that that presumption prevails throughout the progress of the trial.

“2. You are instructed that the defendant is presumed to be a person of good character,

and that that presumption should be considered by you in determining the guilt or innocence of the defendant.

"3. You are instructed that the law presumes the good character of the accused and such presumption is to be considered as evidence in favor of the accused in considering the question of his guilt or innocence.

"4. You are instructed that the defendant is presumed to be a person of good character.

"5. You are instructed that the accused is presumed to be a person of good character, and that that presumption is to be considered in favor of the accused in considering the question of his guilt or innocence."

These requests were severally denied and exceptions taken (Tr., p. 38), and the action of the trial court assigned as error in paragraphs 7-11, inclusive, of the assignment of errors (Tr., pp. 42 and 43). These assignments all present the question whether a defendant in a criminal trial in the Federal Court, where no evidence is offered in support of or bearing upon his character, is entitled, upon a seasonable request made in writing, to have the jury instructed that he is presumed to be a person of good character. The action of the trial court in denying the instructions requested was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit by a divided court, Hook, Circuit Judge, and

AMIDON, District Judge, concurring, and SMITH, Circuit Judge, dissenting. (Tr., pp. 49-53, inc.).

***Point 1.*** The text writers almost unanimously support the rule that a defendant in a criminal trial, whether in a State or a Federal Court, where no evidence has been offered touching upon character, is presumed to be a person of good character.

In 12 Cyc 389, in discussing the presumption of character, it is said:

“Some of the courts have held that the law presumes that the accused is a man of good character, and if he offers no testimony to prove his character the jury is not at liberty to presume that his character is bad. Other courts have held that nothing is presumed by law as to the character of the accused, and that in the absence of any proof on the subject the jury are not authorized to assume that it is either good or bad, but must base their verdict solely upon the evidence.”

In support of the rule that the law presumes that the accused is a man of good character, Cyc and the Annual Annotations thereto to 1917, cite authorities from the District of Columbia, Iowa, Kansas, New York, North Carolina, the District Court of the United States for the Southern District of Ohio, and the United States Circuit Court of Ap-

peals for the Sixth Circuit. While, to support the rule that nothing is presumed by law as to the character of the accused, cases are cited from Alabama, Georgia, Illinois, North Carolina and New York.

Concerning the cases cited in support of the latter rule, counsel desire to point out that the lone case from Georgia, *Haynes v. State*, 17 Ga. 465, is not precisely in point, and is overruled, so far as applicable here, by the later cases of *Goggans v. Monroe*, 31 Ga. 331, and of *Bennett v. State*, 86 Ga. 401, 12 S. E. 806, 29 Am. St. Rep. 465, 12 L. R. A. 449. It will be observed that the Alabama cases cited (*Danner v. State*, 54 Ala. 127; *Newsom v. State*, 107 Ala. 133, 18 So. 206; *Little v. State*, 58 Ala. 265; *Dryman v. State*, 102 Ala. 130, 15 So. 433; *Gater v. State*, 141 Ala. 10, 37 So. 692, and *Griffin v. State*, 165 Ala. 29, 50 So. 962) begin with *Danner v. State*, *supra*, in which the court contents itself with a mere statement of the rule, without discussion or the citation of authorities; and that the subsequent decisions of the court merely follow *Danner v. State*, without citing any other authority. Also, the Illinois case, *Addison v. People*, 62 N. E. 235, in which an instruction that good character is presumed was denied, cites no authorities; and the only reason given in the opinion is that "if such were the law, a defendant need never prove good reputation, but could take the benefit of proof which perhaps he could not make." But such is

of the nature and effect of any presumption of law, to-wit, that the accused may avail himself of it without proof; and that the presumption gives him the benefit of proof which perhaps he could not affirmatively make. Moreover, the observation of the court, that if such were the law a defendant need never prove good reputation, is hardly correct, for the reason that the presumption of good character may be, and often is, strengthened and supported by testimony of reputable witnesses that the defendant has an *excellent* character.

—12 Cyc 412.

We reserve for future discussion the cases from North Carolina and New York.

In 12 Cyc 412, in discussing the evidence of good character of the accused, it is further said:

“The accused is not compelled to rely altogether on the presumption of his good character, but must be permitted to introduce affirmative evidence thereof, as tending to show that it is not probable that he would commit the crime charged. \* \* \* .”

In 22 Am. & Eng. Enc. of Law, (2nd ed.) p. 1284, it is said:

“In the absence of proof to the contrary, a person’s character is presumed to be good. It has been held that this rule applies to the character of the accused in a criminal prosecution,

and that the failure of an accused to call witnesses as to his general good character raises no presumption or inference that his character is bad."

Authorities in support of the text above quoted are cited from the following states: California, Georgia, Indiana, Iowa, Maine, Michigan, Missouri, New York, Texas and District of Columbia. The only citation contrary to the rule as stated, is the case from Alabama of *Danner v. State*, above referred to.

In 3 Encyclopedia of Evidence, p. 34, it is said under the title of Character:

"The law presumes the good character of a person accused of crime, and no inference of bad character arises from his failure to offer evidence of good character. But if he elects to offer evidence of his good character he must rest the question upon such evidence alone, unsustained by the legal presumption."

In 9 Encyclopedia of Evidence, p. 927, it is said under the title of Presumptions:

"The general rule, both in civil and criminal cases, is that character is presumed to be good in the absence of evidence to the contrary, and that the defendant in a criminal case is entitled to an instruction to this effect, applied particularly to his own character. In some jurisdictions, however, it is held that in the ab-

sence of evidence there is no presumption one way or the other as to the character of the defendant in a criminal prosecution."

In Jones on Evidence, (2nd ed.) at p. 178, it is said:

" \* \* \* The law presumes the character of a party to be good until the contrary is shown and he can safely rest on that presumption."

It should be observed that Mr. Jones' discussion of the presumption of innocence (*Id.*, Secs. 12, 13 and 14) seems to indicate that he considers this presumption broad enough to include conduct in general, as well as innocence of a particular crime when charged; or in other words, that the presumption of innocence raises a presumption not only against the particular crime charged, but also against all crime or wrong-doing (which in effect means good character); and that such presumption of innocence of all crime exists as much before, as after, an indictment containing a specific charge is returned.

In Wharton's Criminal Evidence, (9th ed.) Sec. 57, it is said:

"While a defendant's character is presumed to be good until it is impeached, it is always advisable for him to prove that his character was such as to make it unlikely that he would have perpetrated the act charged upon him. \* \* \* But the general rule is that unless

the defendant introduces evidence to prove his character to be good, it cannot be assailed by evidence on part of the prosecution."

And it is further said, *Id.*, Sec. 62:

"If a person on trial for an alleged offense offer no evidence of his good character, no legal inference can arise from such omission that he is guilty of the offense charged, or that his character is bad."

In Wharton's Criminal Evidence, (10th ed.) Sec. 57, it is said:

" \* \* \* Now, character is always presumed to be good until it is impeached, but notwithstanding such presumption it is always relevant for the defendant to offer affirmative evidence of character, and to prove that it was such as to make it unlikely that he would have committed the act charged against him. \* \* \*

"However, the presumption of good character always prevails, and until the defendant opens the door and offers affirmative evidence of his good character, it can not be shown to be bad by the prosecution."

The note on presumption of good character, found in 20 L. R. A. 609, states the law as follows:

"The law is clearly settled at the present time, notwithstanding some early decisions to the contrary, that the presumption of previous good character is not divested by the failure to

offer evidence in support of the same, and that the failure to offer evidence of good character is not subject to criticism of counsel or unfavorable construction by the jury."

In 1 Bishop on Criminal Procedure (2nd ed.), Sec. 1062, it is said:

" \* \* \* Evidence, therefore, of bad character, where the prisoner has introduced no evidence in support of his character, cannot be brought forward by the government in the first instance against him. \* \* \* But after the government has made out its *prima facie* case against the prisoner, then, his character, or at least his conduct, having been thus attacked, he may give evidence of his good character *to sustain the original presumption of the law*; and, in reply to this the government may introduce evidence of his bad character." (Italics ours.)

In Bishop's New Criminal Procedure (4th ed.), section 1112, it is said:

"The doctrine is that the defendant is presumed to be innocent; and his character to be, at least, of ordinary goodness." \* \* \*

And it is further said, *Id.*, Sec. 1119:

"It is the defendant's privilege, not his duty, to open by evidence the question of his character. \* \* \* Hence, and because the state may not show a character bad which the defendant has not put in issue, the omission of this evidence does not justify the presumption

that it is not good; and neither counsel nor the judge has the right to argue to the jury that it does, nor should they assume anything against it while deliberating on their verdict." \* \* \*

In Lawson's Law of Presumptive Evidence (2nd ed), p. 520, the author, in discussing presumptions in criminal cases, lays down the rule that good character is presumed in favor of the accused. The same rule was announced in the author's first edition on Presumptive Evidence, at page 442.

In 3 Rice on Evidence, page 597, it is said:

" \* \* \* And it must be considered that, in criminal trials, it is always proper to prove the previous good character of the accused, in order to show that it was unlikely that such a person would have perpetrated the crime, and this notwithstanding his *good character is presumed* until it is impeached." (Italics ours.)

In Hughes on Criminal Law and Procedure, Sec. 3156, it is said:

"Sec. 3156. *Defendant's Character Presumed Good.* Where a person is charged with crime, the failure to call witnesses to prove his general good character raises no presumption against it."

In Underhill on Criminal Evidence, (2nd ed.) Sec. 76, it is said:

" \* \* \* The accused may always prove his good character.

“If, however, he offers no evidence of good character, the *law presumes he has a fair and respectable, if not, indeed, an excellent character*, and does not permit any presumption of guilt to arise from his silence as to his character or from his failure to offer evidence on this point. That his character is bad can never be presumed with proof, nor should the prosecution be permitted to comment unfavorably upon his omission to offer evidence of character.” (Italics ours.)

In Sackett's Instructions to Juries (2nd ed.), Sec. 42, under chapter 50, entitled “General Instructions in Criminal Cases,” the following instruction is given:

“SEC. 42. *Good Character Presumed.*—The court instructs the jury, that the character of an accused person is, in law, presumed to be good until the contrary appears from the evidence, and he is under no obligation to prove a good character until his character is, in some manner, attacked, and the jury will not be justified in drawing any inference unfavorable to the defendant, from the fact that he has offered no proof as to good character in this case.”

Also, *Id.*, Sec. 44, the following instruction is given:

“SEC. 44. *Omission to Prove Good Character.*—That the law not only presumes that every person is innocent until he is proven guilty, but the law also presumes that a person has a good character and reputation for (honesty) until the

contrary is shown by the evidence, and the jury have no right to consider the omission on the part of the defendants, R. and H., to introduce evidence of good character as a circumstance against them, or as tending to show their guilt in this case. 1 Wharton on Crim. Law, Sec. 637; *State v. Tozier*, 49 Me. 404; *People v. Bodine*, 1 Denio 281."

No citation of authors on a question of evidence would now probably be considered complete without reference to Mr. Wigmore's comprehensive work on Evidence. This eminent author lays down the rule that a defendant may always offer his good character to evidence the improbability of his doing the act charged. *Id.*, Sec. 56. Also the rule that after a defendant has attempted to show his good character in his own aid, the prosecution may in rebuttal offer as evidence his bad character. *Id.*, Sec. 58. And further the rule that the prosecution can not invoke and prove the defendant's character bad until he offers to prove his character good. *Id.*, Secs. 57 and 290. And finally the rule that the accused's failure to produce testimony to his *good character* is not open to the inference that the character is bad, since otherwise the rule would be invaded, that the prosecution cannot invoke and prove his bad character until he offers to prove his character good. *Id.*, Sec. 290.

In note 2 to said section 290, the author cites several cases concerning which he says, in parenthesis,

hold that the absence of good character evidence simply leaves the defendant without "such a benefit"; and that this is not the same as directing an inference that the character is bad. The author says further in the same note:

" \* \* \* But note that it is incorrect to say (as in *Mullen v. U. S.*, 46 C.C.A., 22, 106 Fed. 892; 1901) that the accused's good character is presumed; this inconsistently gives him the untrammelled benefit of evidence which if he had introduced might have been disputed. What really happens, or ought to, is that the defendant's character is simply a non-existent quantity in the evidence; this distinction has sometimes been expressly pointed out; 1901, *Addison v. People*, 193 Ill. 405, 62 N. E. 235; 1880, *Knight v. State*, 70 Ind. 380."

As much may be said of any presumption of law, that it gives the party invoking it the benefit of evidence, which if introduced, might have been disputed. Moreover, even if there is a presumption of law in favor of the good character of the accused, which cannot be attacked by the prosecution until the defendant has offered evidence to support, to strengthen, or to fortify it, still the question of good character is collateral to the main issue in every criminal case. Hence, no hardship is thereby placed on the prosecution, because when competent testimony is offered to prove the defendant's guilt of the crime

charged beyond a reasonable doubt, the jury may convict, notwithstanding the presumption of good character, and even notwithstanding the defendant may have strengthened, supported or fortified the presumption by offering affirmative evidence of his good character. Furthermore, the same sound reason underlying the presumption of innocence, namely, that people generally do not violate the law, would seem equally to warrant a presumption that the majority of people are of good character also. Indeed, if the presumption of innocence means innocence of *all crime*, as well as innocence of the particular crime charged, then the presumption of innocence itself means innocence of all wrongdoing, in which condition one may reasonably be said to be of good character.

Also Mr. Wigmore seems to take too little account of the reasons upon which are founded the fundamental rule of the common law that the prosecution is not allowed to resort to the accused's bad character as a basis of inference of guilt, namely, that such evidence is too likely to move the jury to condemnation without proof of guilt of the offense charged; and also of the reasons which underly the

fundamental rule that, when the accused has offered evidence in support of his good character, namely, *the prosecution may reply with evidence of bad character.* that such character evidence of the prosecution is admitted not so much by way of exception to the rule

excluding bad character evidence as an inference of guilt, but that such evidence of the prosecution is admitted rather for the *purpose of preventing the accused from imposing upon the tribunal by false evidence of good character*. 1 Greenleaf on Evidence (16th ed.), Sec. 14 b(1). And while to hold that the defendant's character is a non-existent quantity without evidence supporting it, may not be equivalent to "directing an inference that the character is bad," as Mr. Wigmore points out in his note, still the defendant is in need of more protection than that. Because, without the presumption of good character, or if the defendant is left with his character as a non-existent quantity, the jury is too likely to infer that the defendant's character is bad, because of the absence of any presumption or evidence on the subject, and to infer from such condition that the defendant is guilty of the crime charged, in contravention of the rule that bad character or lack of good character can not be used as a basis of inference of guilt.

It should be noted that the presumption of good character is created by law, not so much as a matter of benefit to, or defense for, the defendant, as to prevent the jury from inferring bad character, which the jury might do without such presumption and in the absence of evidence, and thereby be inclined to convict the defendant in violation of the rule that bad character or lack of character cannot be made

the basis of inference of guilt. In this respect the presumption is similar to the presumption of good faith in business relations, which, in 2nd Wharton's Criminal Evidence, Sec. 727, is said to be a postulate to be regarded as an assumption merely for the determination of the burden of proof.

Since the majority of men are of good character, why should not the law create a presumption to this effect, as all laws are made for the benefit of the majority? And is it any reason for striking down the presumption of good character, merely because some defendant might some time get the benefit of what he could not otherwise establish by evidence? Is it not better that one man out of a hundred should be placed in a too favorable light before a jury (if you wish to call it that), than that the other ninety-nine men should have a burden placed on them of proving good character in every case, or be compelled to submit to the unfavorable speculation of the jury created by the absence of the presumption of good character and the absence of evidence on the subject? It may be all right to say to persons versed in the law that the defendant's character is simply a non-existent quantity, but when this theory is to be put into practice by a jury of laymen not versed in the law, it simply means that in ninety-nine cases out of a hundred a defendant in a criminal trial, who does not bring affirmative evidence of his good character, suffers at

the hands of the jury an inference that his character is bad, which often contributes in a large measure to his conviction.

The jealousy with which the common law has uniformly prevented bad character from being used as an inference of guilt by juries, and the rule that prevents an unfavorable inference to be drawn from lack of evidence of good character (which is merely another way of saying that defendant's character is presumed to be good), and the rule that admits evidence of bad character by the prosecution only after defendant has introduced affirmative evidence of his good character, and that then such evidence is admitted chiefly for the purpose of preventing fraud on the court, rather than as a *factum probans*, of themselves demonstrate the reason and necessity for the presumption of good character.

That a defendant's character is either good or bad is just as true, generally speaking (and in the opinion of juries), as that a defendant is either dead or alive. The very questions used in interrogating witnesses to impeach one's character, "Are you acquainted with defendant's general reputation as a law-abiding citizen in the community in which he lives?" and "Is that reputation good or bad?" show conclusively that neither the law nor juries recognize any intermediate state of character between

good or bad. Accordingly, if a jury be told that there is no presumption that defendant's character is good, the ordinary person will, according to the same logic, probably understand, or more probably infer, at least, that defendant's character is bad, there being only two ordinary conditions or states descriptive of character, one good and the other bad.

We submit, therefore, that the text writers above referred to unanimously agree, with the exception of Mr. Wigmore, that a defendant in a criminal case, in the absence of evidence on the subject, is presumed to have a good character.

**Point 2. The decisions of the Supreme Courts of a majority of the States of the Union support the contention that the defendant, in the absence of evidence touching upon character, is presumed to be a person of good character.**

An examination of the decisions of the Supreme Courts of the various states will show that an overwhelming majority support the rule that a defendant is presumed to be a person of good character, notwithstanding no evidence is offered on the subject at the trial. This rule, however, seems to have been stated in several decisions (as we have heretofore shown has been done by some authors), in a negative form, as, for example, that, where the de-

fendant offers no evidence in support of good character, no comment can be made by the prosecution on such failure to offer evidence, and that the jury is not warranted from the absence of character evidence, in inferring that defendant's character is bad. However, the majority of the cases announce the rule in the other form, that the defendant is presumed to be a person of good character. Many of the cases fail to show whether the jury was instructed by the court of its own motion, or at the request of defendant's counsel. And it may be that the almost universal recognition of the presumption of good character furnishes the reason for there being so few decisions in which the question is squarely raised and decided.

It will be noted that some of the later decisions of the Supreme Courts of a few states, such as Alabama, Illinois, and New York, now deny the existence of a presumption of good character in such a case; but as the rules of evidence applicable to criminal trials in the Federal Courts are not controlled by state decisions, or statutes, and as these cases are in the minority, and are not supported by the better reason (which we shall hereafter endeavor to point out), we do not think that these decisions should have an important bearing upon the question in the present case.

In *People v. Fair*, 43 Cal. 137, it is held:

“The fact that the defense made by a woman charged with the murder of a man is rendered more formidable, when considered in connection with the good character which the law presumes her to possess, does not of itself open the door for the prosecution to prove that her general character for chastity is bad.

“The presumption of a character of ordinary fairness, with which the law for the purposes of trial clothes a person accused of crime, is one to which he is entitled and which cannot be put in peril, unless he, by introducing testimony in reference thereto, elects to put it distinctly in issue.”

In the opinion the court say, at p. 149:

“Supposing, however, that an investigation upon that point, or upon any other given point of the general character of the prisoner, had been pertinent in itself, it is nevertheless, settled by an overwhelming current of judicial decisions that it is not competent to the prosecution to initiate the inquiry, and that it is only after the prisoner has elected to put his character in issue, by calling witnesses and adducing evidence in its distinctive support, that the prosecution is permitted to follow and disprove the evidence so offered, if it can. Nor is the prisoner to be held to have thus led the way, and opened up her character to the attack of the prosecution, merely because the case made or attempted in the defense is rendered more formidable

*when considered in connection with the good character—good in the sense of not being bad—which the law assumes the prisoner to possess in cases in which no evidence upon the subject of general character is offered. The presumption of a character of ordinary fairness, with which the law clothed her for the purposes of the case, was one to the benefit of which she was entitled, and which could not be put in peril unless, discarding the presumption thus afforded her, she had elected to put it distinctly in issue, and so constitute it a fact to be determined by the jury as other facts in issue were to be determined.”*

And again, at p. 151, it is said:

“It is not sufficient, within this rule, that there be something in the facts or line of defense relied upon by the prisoner which might be made to appear in a less favorable aspect for her, by instituting an inquiry into her character and proving it to be other than of that ordinary degree of fairness which the law presumes it to be, for however peculiar the facts or circumstances may be in a given case, the rule is absolute upon the point that the character of the prisoner is not open to assault, as a distinctive feature of the case, until the prisoner shall have brought it forward and invited the attack of the prosecution, by arraying the evidence in its support. *Until the prisoner thus initiates the inquiry, the prosecution are bound to assume it to be, as the law presumes it, ordinarily fair, and must establish her guilt, if at all, in*

the face of this presumption, and despite the benefit it affords her." (Italics ours.)

In *People v. Gleason*, 55 Pac. 123, 122 Cal. 370, it is held:

"Where accused has offered no evidence of character, an instruction that an accused's character can not be assailed, unless he himself has put it in issue by calling witnesses in its support, is erroneous, as raising the inference that the people, had they been permitted, might have shown that accused's character was bad."

The Supreme Court of California, by HARRISON, J., say, at p. 123:

" \* \* \* *The law assumes that a defendant who is upon trial for an offense has a fair character, and, unless evidence to the contrary is given to the jury, he is entitled to the benefit of this presumption in their consideration of the weight to be given to the testimony bearing upon his guilt. In the present case there was no evidence at the trial in reference to the character of the defendant, and he had the right to have the jury, in considering the evidence before them, assume that his character was unimpeached. He was not required to offer witnesses in support of his character, but had the right to rely upon the above presumption; \* \* \* .*" (Italics ours.)

In *Goggans v. Monroe*, 31 Ga. 331, it is held:

"Defendant's counsel on the trial, having

argued to the jury that plaintiff's character was bad, it was error in the court to refuse to charge, on request, that the law presumes the character of a party to be good until the contrary is proven."

The court, at p. 334, say:

"Defendant's counsel having argued that plaintiff's character was bad, and this argument being likely to prejudice his case before the jury, he was entitled to the legal presumption that, in the absence of evidence proving the contrary, his character was good; and it was error in the court to refuse to charge, on request, that the law did so presume."

In *Bennett v. State*, 12 S. E. 806, 86 Ga. 401, 29 St. Rep. 465, 12 L. R. A. 449, it is held:

"It is error to allow the prosecuting attorney to argue to the jury that, since defendant had a right to prove his good character, and had not done so, his character was bad, although defendant's counsel had, without evidence, argued that defendant's character was good."

The Supreme Court of Georgia, in discussing the presumption of good character, at p. 807 say:

"There are many authorities which hold that the law presumes that a defendant has a good character. This was held in the case of *Stephens v. State*, 20 Tex. App. 269; and in the case of *Cluck v. State*, *supra*, the Supreme Court

of Indiana held that the law presumes that every man has a good character, and that it would have been competent for counsel to have commented on such presumption. This rule is also laid down in Sackett on Instructions to Juries, p. 500. In the case of *Goggans v. Monroe*, 31 Ga. 331, the defendant's counsel, in his argument, insisted that the plaintiff's character was bad, whereupon counsel for the plaintiff requested the court to charge the jury that the law presumed the plaintiff to be of good character until the contrary was shown by proof. The trial judge refused to charge as requested, and this court held that 'it was error in the court to refuse to charge, on request, that the law presumes the character of the party to be good until the contrary is proven.' JENKINS, J., in delivering the opinion, said: 'Defendant's counsel having argued that plaintiff's character was bad, and this argument being likely to prejudice his case before the jury, he was entitled to the legal presumption that, in the absence of evidence proving the contrary, his character was good; and it was error in the court to refuse to charge, on request, that the law did so presume'."

In *Cluck v. State*, 40 Ind. 263, the Supreme Court of Indiana, concerning the presumption of good character, say, at p. 270:

"It is next claimed that the court erred in refusing to permit the counsel for the appellant to comment, in argument, upon the general character of the prisoner. There is nothing in the

objection. It is shown by the bill of exceptions that no evidence was offered, either by the defendant or the state, as to the character of the defendant. *The law presumes that every man has a good character, and it would have been competent for the counsel to have commented on such presumption;* but he had no right to discuss the character of the accused, unless such character had been put in issue by the evidence.

“It is not shown by the bill of exceptions that the counsel attempted to comment on the presumption of good character, or that he was denied that right; but it is shown that he was prevented from discussing his character.” (*Italics ours.*)

In *Fletcher v. State*, 49 Ind. 124, 19 Am. St. Rep. 673, it is held:

“The law invests every person accused of crime with a presumption in favor of good character, and the state cannot offer evidence to impeach such character until the accused has put his general character in issue, by offering evidence in support of it.”

At p. 129 of the opinion, delivered by BUSKIRK, Chief Justice, it is said:

“*The law invests every person accused of crime with a presumption in favor of good character, and the state cannot offer evidence to impeach such character until the accused has put his general character in issue by offering evidence in support of it. The presumption in fa-*

*vor of good character continues, and must be indulged, as long as the accused rests upon such presumption; but when he abandons the shield which the law has thrown around him, and attempts by affirmative evidence to prove, as a fact, that his general character is good, he opens the door for the admission of evidence on the part of the state to prove that his character is bad."*

Concerning the objections made to the argument of counsel as to the character of Fletcher, the court further say at p. 134 of the opinion:

"Objection is made to argument of counsel on behalf of the state. Such attorney, while 'addressing the jury, commented on the general character of the defendant, and said that said defendant had the power to produce evidence to prove and sustain his general reputation and moral character before the jury, and argued that his failure to do so might be considered against him.'

"While the appellant had the right to introduce such evidence, he was not bound to do so, and his failure to do so could not be commented on in argument. *The legal presumption in his favor could not be impaired or destroyed by his failure to offer affirmative evidence as to character. State v. Upham, 38 Me. 261; Walker v. The State, 6 Blackf. 1.*" (Italics ours.)

In *State v. Kabrich*, 39 Iowa 277, it is held:

"The character of one charged with an offense is not in issue unless he himself introduces

evidence relating thereto. The failure to call witnesses to prove his general good character raises no presumption against it."

Kabrich offered no evidence of good character, but the court instructed the jury as follows:

"Defendant is presumed to be innocent until he is proven guilty. Defendant had the legal right to introduce testimony in support of his character, and the fact that he failed to do so is a circumstance that you may consider, with all the other testimony in the case, in determining the question of guilt,"

which was excepted to and assigned as error.

After referring to the general rule that a defendant may give evidence of his character, but that his character is not in issue and cannot be attacked by evidence on the part of the prosecution until such evidence is offered by the defendant, the Supreme Court of Iowa refer to the case of *People v. Bodine*, 1 Denio 281, which holds that when no evidence of good character is given, the law assumes that it is of ordinary fairness and respectability; and that an instruction substantially as given in the *Kabrich* case was erroneous because it meant, in effect, that the failure of the accused to offer evidence of his good character afforded an inference that it was bad.

It was noted that the *Bodine* case is sustained by the decision in *State v. O'Neal*, 7 Iredell 251, 29 N. C.

197, which also holds that, if the defendant chooses to offer no evidence on the subject, no deduction results therefrom unfavorable to his character; and that the fact that the defendant offered no evidence of his good character, was not proper for the consideration of the jury.

The Supreme Court of Iowa, in the *Kabrich* case, also points out that *State v. McAllister*, 24 Me. 139, holds that the omission of the accused to furnish evidence of his previous good character may be called to the consideration of the jury by the prosecution; and that this case and the overruled case of *People v. Vane*, 12 Wend. 78, are the only ones which sustain this doctrine. It then adopts the rule announced in the *Bodine* and *O'Neal* cases as more in accord with principle. It is said in part, at p. 279:

“ \* \* \* that the prosecution cannot convert a failure of the defendant to give evidence of his good character, into evidence of bad character, thus doing indirectly what could not be done directly, converting the entire absence of evidence on the subject into evidence of bad character, and raising a presumption against the accused on a question which was not in issue. \* \* \* ”

It should be noted, also, that the case of *People v. Vane*, 12 Wend. 78, overruled by the case of *People v. Bodine*, *supra*, has also been overruled by the

case of *Donoghoe v. People*, 6 Parker's Criminal Reports 120.

In *State v. Roupetz*, 85 Pac. 778, 73 Kan. 663, the Supreme Court of Kansas recognize that the presumption of good character exists in favor of the accused. The language of the court, at p. 779, follows:

“ \* \* \* It is not the law that the presumption of good character stands until overcome beyond a reasonable doubt, as the sixty-first requested instruction states. It may be overthrown by evidence much less conclusive. \* \* \* ”

In *Howard v. Commonwealth*, 70 S. W. 1055, 14 Ky. 373, it is held:

“The court is not required to instruct the jury that the law presumes the accused to be of a good character, and that this presumption continues throughout the case, though such instruction may be correct as an abstract proposition.”

The Supreme Court of Kentucky, by DU RELLE, Justice, say at p. 1059 of the opinion:

“Considerable argument is devoted to the proposition that the law presumes the accused to be a person of at least ordinary good character; that this presumption continues throughout the case, and is evidence in favor of the accused; and that an instruction should have been given upon this subject. As an abstract prop-

osition of law, there is no doubt of the correctness of the proposition, which is supported by innumerable authorities.”

The court then refers to the different procedure between state and federal courts, and concludes that there was no error in refusing so to instruct without a request therefor. The case, on the whole, however, correctly states and recognizes the rule of law here contended for and that it obtains in trials in the federal courts.

In *State v. Upham*, 38 Me. 261, the former case of *State v. McAllister*, 24 Me. 139 (which decided that, if a defendant offers no evidence of good character, the prosecutor is at liberty to raise an inference, in an argument to the jury, of the guilt of the defendant, or of his bad character), was expressly overruled. In delivering the opinion of the court, HATHAWAY, J., said:

“The prosecutor cannot be permitted to offer testimony concerning the prisoner’s character, unless the prisoner enable him to do so by introducing testimony in support of it. 2 Russell on Crimes 704; 3 Greenleaf’s Ev., Sec. 25. *Where, upon the trial on an indictment, no proof as to general character of the prisoner is given, the law presumes that it is of ordinary fairness. If he choose to give no evidence upon the subject, the jury is not at liberty to indulge in conjecture that his character is bad, in order to in-*

fer that he is guilty of the particular crime charged. *Ackley v. The People*, 9 Barbour 609. The rulings of the presiding judge in this matter cannot be sustained, either upon principle or authority. *The defendant might well repose upon the legal presumption of his innocence, without apprehending that he incurred the danger of furnishing the basis for an argument against him, by neglecting or declining to introduce witnesses to prove his character good, when the law presumed it to be so.*" (Italics ours.)

In *Hitchcock v. Moore*, 14 Am. St. Rep. 474, 70 Mich. 112, it is held:

"In slander, plaintiff's character is presumed to be of the best, and until it is assailed he cannot introduce evidence to add to or increase its virtue."

The court, at p. 475, say:

"We think the best doctrine and the weight of authority support the ruling made by the court below. *The law presumes the character of the plaintiff to be good until it is attacked, and he can safely rest upon that presumption.* As long as it is not assailed, there is no comparative degree of good, better, best, in his character. It stands as the best. If he himself open the inquiry, then the comparison legitimately commences; and upon his own showing, and without any attack by the defendant, his character may be qualified and reduced below the standard

of the presumption, upon which he may confidently rely until it is questioned by the opposite party. Without introducing any evidence, his reputation and character stand without qualification or defect, and no evidence that he may offer can add to or increase its force and virtue. The almost universal rule has been as held by the circuit judge. See the following authorities: *Cornwall v. Richardson*, Ryan & M., 305; *Matthews v. Huntley*, 9 N. H. 146; *Stow v. Converse*, 3 Conn. 325, 8 Am. Dec. 189; *Bamfield v. Massey*, 1 Camp. 460; *Dodd v. Norris*, 3 *Id.* 519; *Houghtaling v. Kelderhouse*, 2 Barb. 149, 1 N. Y. 530; *Gough v. St. John*, 16 Wend. 646; *Anderson v. Long*, 10 Serg. & R. 55; 1 Wharton on Evidence, 2d ed., Secs. 47, 50; *Miles v. Vanhorn*, 17 Ind. 245, 79 Am. Dec. 477; *McCabe v. Platter*, 6 Blackf. 405; *Howard v. Patrick*, 43 Mich. 121. See also, *Fahey v. Crotty*, 63 *Id.* 383, 6 Am. St. Rep. 305, and cases there cited."

In *People v. Evans*, 40 N. W. 473, 72 Mich. 367, it is held:

"It is reversible error to allow a prosecuting attorney to comment to the jury upon the circumstance that the respondent has called no witnesses to testify as to his character, and such error is not cured by a subsequent instruction to the jury not to consider those comments."

The court say, in part, at p. 479:

"No presumption of guilt arises from the fact that a person, when on trial for a crime, fails to call witnesses in support of his good

character. This is a privilege which the accused may avail himself of if he chooses. If a person on trial for an alleged offense offers no evidence of his good character, no legal inference can arise from such omission that he is guilty of the offense charged, or that his character is bad. Whart. Crim. Ev., (8th ed.) Sec. 62. The court should not have permitted such an argument to the jury. The jury, while deliberating on their verdict, have no right to take into consideration the fact that respondent failed to call witnesses in support of his good character, and weigh it against him in any manner to establish guilt. 1 Bish. Crim. Proc., (3d ed.) Sec. 1119."

"The error was not cured by the court afterwards instructing the jury that they should not consider such argument. Counsel for respondent call our attention to a recent case in Illinois fully sustaining this doctrine. The statute of Illinois provides that 'the defendant in any criminal case or proceeding shall only, at his own request, be deemed a competent witness; and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect.' In *Quinn v. People*, 15 N. E. Rep. 46, counsel had assumed to comment on defendant's failure to testify in his own behalf; and the Supreme Court of Illinois, considering that case, say: 'How much did it avail for the court to tell the jury that the remarks of counsel were improper? His words had found a lodgment in the minds of the jury, spent their

force, and subserved the purpose for which they were intended, and it were idle to talk about removing their effect upon the jury by a mere declaration from the court that they were improper. As well might one attempt to brush off with the hand a stain of ink from a piece of white paper. One, in the very nature of things, is just as impossible as the other.' It cannot matter whether these safeguards are thrown around the accused by statute or by the common law, to the end that he have a fair and impartial trial. It was gross error for the prosecution to indulge in such remarks, and the error was not cured by the charge of the court."

In *Olive v. State*, 7 N. W. 444, 11 Neb. 1, the Supreme Court of Nebraska concerning the presumption of good character, at p. 453, say :

"Another instruction seriously complained of is as follows: 'Every man is presumed, in law, to have a good character until the contrary is proved. The indictment in this case having been found, and the prisoners put on trial, their character thereby have a *stain* or *imputation* cast upon the original presumption. To remove this stain or imputation, and restore their characters to their former presumption, they have introduced witnesses to prove their good character among their neighbors, and in the community in which they live, for peaceableness, quietness, and as law-abiding citizens. \* \* \* ' This instruction is faulty—*First*, in its statement that by the facts of indictment found, and

the placing of the accused on trial, a *stain* or *imputation* rested on their characters; and, *second*, in limiting the object of this evidence to the restoration of their characters to their former condition. WHARTON says: 'The general object for which such evidence is introduced is to disprove guilt;' and that, even if the accused 'offer no evidence of his good character, no legal inference can arise, from such omission, that he is guilty of the offense charged, *or that his character is bad.*' Whart. Am. Crim. Law, Secs. 636, 637. The exception to this instruction, therefore, was well taken."

In *Biester v. State*, 91 N. W. 416, 66 Neb. 276, it is held:

"The general character of the defendant in a criminal case is not necessarily involved in the issue; the presumption is that his character is good, but he is not obliged to rely on this presumption; he may buttress it with evidence, and such evidence may be met by the state with opposing proof."

The court, at p. 417 of the opinion, say:

"The facts found by the trial court make it certain, regardless of the general rule in such cases, that the county attorney had good reason for subpoenaing witnesses to prove that the defendant was of bad repute in the neighborhood where he lived. *Biester's character was not necessarily involved in the issue; it was presumed to be good, but he was not required to rely on*

*the presumption; he was at liberty to buttress it with evidence.* Such evidence the state had, however, a right to contradict; but from the record before us we cannot believe that the county attorney acted with common prudence or discretion in summoning 16 impeaching witnesses. \* \* \* ” (Italics ours.)

In *People v. Bodine*, 1 Denio 281, 16 N. Y. Cr. Law R. 796, it is held:

“Where no evidence of general character has been given, the subject of character is not one for the consideration of the jury.”

At p. 314 of the opinion, the court say:

“The remarks of the judge upon the subject of general character were, in the main, correct, although, I think, he erred in the stress laid on the absence of evidence of good character. He seems, in effect, to have advised the jury that, as the prisoner, who alone could make the question, gave no evidence that her general character was good, this authorized an inference that it was positively bad.

“This presented a question for the jury which, I think, was not properly before them. *Where no proof of general character is given, the law assumes that it is of ordinary fairness and respectability.* \* \* \* ” (Italics ours.)

In *People v. White*, 24 Wend. 520, 14 N. Y. Criminal Law Rep. 693, it is held:

“Where a judge, in his charge on the trial

of a criminal case, after alluding to the benefit of good character to the accused in a doubtful case, called the attention of the jury to the absence of such proof in the case before them, it was held that he had erred, and a new trial was granted."

In the separate opinion of Senator FURMAN, at p. 559 of the opinion, it is said:

"It has been said that there is nothing objectionable in the charge of the presiding judge, that, 'When the scales of justice are nicely poised, the evidence of a good character and virtuous life had great weight in turning the balance in favor of the prisoner'; and that in this case there was an absence of such testimony on the part of the prisoner; and it has been further urged, that the whole of the judge's charge is not here, and that we are to presume that he also charged the jury, that if they had any reasonable doubt on their minds, they should permit it to weigh in favor of the prisoner. In my judgment, even if we should admit such presumption (although I must protest against all these presumptions on a capital trial), it does not do away with the strong objection which exists against it. The most honest and virtuous man in the community might be sacrificed on that rule. Any one of the members of this court some thousand miles from home, among strangers, might be charged with murder (things full as extraordinary as that have happened), and although his character might be unspotted, and he be, indeed, noted for his 'good character and

virtuous life' at home and among his acquaintances, yet, upon such a trial for murder, it might be out of his power to produce a single witness to prove such his good standing and reputation; and upon the rule here laid down, he might in a doubtful case, from the want of such testimony, be convicted, although entirely innocent. The judge had no right in his charge to give to the people the benefit of evidence against the good character of the prisoner, which they would not have been allowed to prove by direct testimony. I cannot see from the reading of this charge of the judge how it could possibly have operated in any other way upon the minds of the jury than to induce the conviction of the prisoner; and that it never could have operated in his favor."

In *Ackley v. People*, 9 Barb. 609, it is held:

"Where, upon the trial of an indictment, no proof is given, as to the general character of the defendant, *the law assumes that it is of ordinary fairness.*

"A prisoner on trial may show what his reputation is, and then the question is open to the prosecution, and for the jury to determine, like other controverted facts. But if the prisoner chooses to give no evidence on the subject, the jury are not at liberty to indulge in conjecture that his character is bad, in order to infer that he is guilty of the particular crime charged."

The above case was an indictment for burglary and larceny. At the close of the evidence and after

the argument of counsel, and after the court had charged the jury, which was about to retire to deliberate upon its verdict, the defendant requested the court to charge that, inasmuch as no evidence had been given of the general character of the defendant, the law would presume it of ordinary fairness, etc.; and if the prisoner did not choose to give evidence upon the subject, the jury were not at liberty to indulge in conjecture that his character was bad. The court declined so to charge, and did charge, that in a case of circumstantial evidence only, proof of the defendant's good character was admissible to repel the inference of guilt arising from such circumstances; and that the absence of such proof of good character, was not to be taken into the account against him. An exception was taken, and, the defendant having been convicted, a writ of error was sued out to the Supreme Court.

In the opinion by WELLES, P. J., it is said, at p. 610:

“According to the doctrine of the court in *The People v. Bodine* (1 Denio 314), the charge to the jury in this case, in regard to the consequence of the defendant's omission to give evidence of good character, was erroneous. If the court had simply declined charging as requested by the prisoner's counsel, there would have been no error on that subject as no evidence had been offered on either side, touching the de-

fendant's general character; and according to some of the authorities, the views contained in the charge, were sound. *But the more recent cases, hold that where no proof of general character is given, the law assumes that it is of ordinary fairness.* A prisoner on trial, may show what his reputation is, and then the question is open to the prosecution, and for the jury to determine, like other controverted facts. But if the prisoner chooses to give no evidence on the subject, the jury are not at liberty to indulge in conjecture that his character is bad, in order to infer that he is guilty of the particular crime charged. As the judgment must be reversed, on the ground of this error in the charge, it becomes unnecessary to consider the other questions raised on the bill of exceptions." (Italics ours.)

In *People v. Weiss*, 114 N. Y. S. 236, it is held:

"While good character is not a defense to crime, it may be a defense to a criminal charge, and proof of good character alone, in the face of what would otherwise be conclusive proof of guilt, may create that reasonable doubt which entitles accused to an acquittal."

The court speaking through MILLER, J., at p. 241, say:

"4. In charging the jury, the judge said:

'Good character is not a defense to a crime. It is to be taken into consideration with all the other facts that are before, and, when a jury get in that condition that they

are in doubt, then that question of good character becomes important, that it may sway them to the side of innocence.'

"Obviously that is not a correct statement of the law. While good character is not a defense to crime, it may be a defense to a criminal charge; and that is doubtless what the jury understood the court to refer to. But, apart from that, the judge in effect told the jury that they could only consider the proof of good character in case they were in doubt; whereas, proof of good character alone in the face of what would otherwise be conclusive proof of guilt may create that reasonable doubt which entitles the defendant to an acquittal. A judgment of conviction was reversed for a charge in substance like this in *People v. Friedland*, 2 App. Div. 332, 37 N. Y. Supp. 974. Before making the erroneous statement above quoted, the judge had read to the jury an extract from the opinion of Judge ALLEN in *Remsen v. People*, 43 N. Y. 6, containing this sentence:

*'There is no case in which the jury may not in the exercise of a sound judgment give a prisoner the benefit of a previous good character. No matter how conclusive the other testimony may appear to be, the character of the accused may be such as to create a doubt in the minds of the jury, and lead them to believe, in view of the improbabilities that a person of such character would be guilty of the offense charged, that the other evidence in the case is false, or the witnesses mistaken.'*

“Doubtless the jury would have understood that quotation if it had not been limited or explained, but we must assume that the jury heeded the statement of the trial judge limiting and explaining its meaning. That statement was directly contrary to the quotation, and explicitly instructed the jury that the evidence of good character was limited in its effect to doubtful cases.” (Italics ours.)

It will be noted that the court in its opinion, in which all the justices concur, quote and approve the rule stated in *Remsen v. People*, 43 N. Y. 6, that there is no case in which the jury may not in the exercise of a sound judgment give a prisoner the benefit of a previous good character. Also, attention should be called to the fact, that the erroneous instruction given was not excepted to or complained of, but, notwithstanding, the court reversed the case, saying that the error committed was so grave and its prejudicial character so manifest that it was its duty to do so in the exercise of its discretion. *Id.*, p. 242. The authorities cited are: *People v. Bonier*, 179 N. Y. 315, 72 N. E. 226, 103 Am. St. Rep. 880; *People v. Elliott*, 163 N. Y. 11, 57 N. E. 103.

In 1913, however, the Supreme Court of New York in *People v. Lingley*, 46 L. R. A. (N. S.) 342, 207 N. Y. 396, 101 N. E. 170, overruled in principle the above New York cases cited, and held that an accused in a criminal case, who offers no evidence as

to his good character, is not entitled to have the jury instructed that the law presumes that it is good. The *Lingley* case cites as supporting authorities the ~~separate~~ <sup>separate</sup> opinion of McKINSTRY, J., in *People v. Johnson*, 61 Cal. 142; 1 Wigmore on Evidence, Sec. 290, note; *Addison v. People*, 193 Ill. 405, 419; and *Knight v. State*, 70 Ind. 375. Among other things, the Supreme Court of New York, speaking through BARTLETT, J., approves the statement of the law made by McKINSTRY, J., in *People v. Johnson, supra*, which is in part as follows, to-wit (*Id.*, p. 348):

“If, in the absence of evidence on the subject, the presumption of good character is to *weigh as much* in his favor as affirmative proof of it, the necessity of proving good character would never arise; and the prosecution would frequently be in a worse case than if evidence of good character had been given, since the prosecution would be debarred from introducing evidence to overcome the presumption.” (Italics ours.)

Certainly, to contend that a presumption of good character exists, does not mean that such presumption “is to weigh” as much in the defendant’s favor as affirmative proof of good character. The *existence* of the presumption is entirely different from the question of the *weight* to be given to it by the jury, and especially from the question of the weight of the presumption as compared with the weight of

affirmative proof of good character. This conclusion is self-evident, as much so as is the statement that the *existence* of the presumption of innocence is entirely different from the question of the *weight* to be given to it, and especially from the question of the *weight of such presumption* of innocence as compared with the weight of *affirmative proof* of innocence. Thus it is erroneous to assume that because the presumptions of innocence and of good character exist, they respectively weigh as much as affirmative proof of innocence and of good character; and it is fallacy to argue from such false assumption that the original presumptions themselves should not or do not exist.

Again, the opinion asserts (*Id.*, p. 349) that the presumption of good character is generally attempted to be supported on the theory that it forms a part of the presumption of innocence. It is then pointed out that since the presumption of innocence is always open to attack by the prosecution, and since the prosecution cannot initially attack the defendant's character, it therefore follows that the presumption of good character is not a part of the presumption of innocence, the inference therefrom being that the presumption of good character does not exist. To begin with, the force of this argument is wholly dependent upon the assumed theory that the presumption of good character forms a part of the presump-

tion of innocence, which we do not concede, though some text writers have coupled the presumption of good character with the presumption of innocence (as pointed out by Mr. Justice DAY in *Mullen v. U. S.*, 106 Fed. 894), for the purposes of discussion at least; or, in other words, have treated it as what may be called a corollary to the presumption of innocence. This manner of treatment may be accounted for on logical grounds, or may be explained by the universality with which the existence of both presumptions have been recognized. But after all, such argument ignores the substance of the presumption and the reasons underlying its existence, and descends to a discussion of its form or manner of existence in order to prove the fact of non-existence. Accordingly, we submit that to argue that because the presumption of good character can not and does not exist in a particular form (*i. e.*, does not and can not form a part of the presumption of innocence), it, therefore, does not exist, is not sound logic, is not conclusive of its non-existence in some other form as a separate and distinct presumption of law, and furnishes no sound reason for holding that there is no such presumption of law.

Also, the opinion of the Supreme Court of New York argues still further (*Id.*, 349) that since the presumption of innocence is always open to attack by the prosecution, the presumption of good char-

acter would likewise be open to attack, if such presumption were a part of the presumption of innocence; and that since the defendant's character can not be initially attacked by the prosecution, the presumption of good character is not a part of the presumption of innocence, and therefore there is no presumption of good character. This argument is merely another statement of the argument noticed above that since the presumption of innocence could be attacked and the defendant's character could not be, the presumption of good character is not a part of the presumption of innocence and therefore there is no presumption of good character. Hence, what we said concerning the matter, *supra*, equally applies here.

However, we wish to observe further that this argument confuses, or treats as one, the situation of a defendant relying on the bare presumption and the situation of a defendant who has offered affirmative evidence in support of his good character. The two situations are very different: When a defendant relies solely on the bare presumption of good character, the question of character is, if at all, only indirectly or collaterally involved. But to the extent that it is thus indirectly or collaterally involved, it may be, and is, indirectly or collaterally attacked, when the prosecution offers evidence to establish the defendant's guilt of the crime charged; and the at-

tack thus made becomes successful, for the purposes of the trial and for all purposes, when a conviction is had, in spite of the presumptions of innocence and of good character. But when a defendant offers affirmative evidence in support of his good character, he makes character a direct issue in the case, to the extent at least that the prosecution can rebut, or reply to, such evidence with evidence of bad character. Yet, bear in mind that this reply evidence of bad character is admitted more for the purpose of preventing a fraud on the court by the defendant's offering false evidence of good character, rather than for the purpose (as some decisions and authors would have us believe) of using such evidence of bad character as an evidentiary fact (*factum probans*) to induce the jury to infer the defendant guilty of the particular crime charged. Because, to use evidence of bad character as a basis of inference to guilt violates the most fundamental rule of evidence, namely, that the prosecution "is not allowed to resort to the accused's bad character as a basis of inference to his guilt."

—1 Greenleaf on Evidence, Sec. 14 b (1).

1 Wigmore on Evidence, Sec. 57.

Continuing, the Supreme Court of New York say further (*id.* 349):

"This prohibition against any attempt to blacken the general character of the accused un-

*less* he open the door by seeking to prove the *excellence* of that character is tantamount \* \* \*."

Evidently this phrase could not have been written by one who wished to approve of the reasons upon which is based the common law rule that, when a defendant offers affirmative evidence in support of his good character, the prosecution can in reply offer evidence of bad character, namely, that such reply evidence is admitted more for the purpose of preventing a fraud on the court by the defendant's offering false testimony of good character, rather than for the purpose of using such evidence as an inference of guilt. Because, as already pointed out, to use bad character as the basis of an inference of guilt is in violation of one of the most fundamental rules of the common law. 1 Greenleaf on Evidence, Sec. 14 b (1). Both the rule governing the theory and the purpose of the admission of bad character evidence are based chiefly on the fact that such evidence is inherently unreliable and tends to excite undue prejudice. Hence, no act of the defendant or of his counsel in the conduct of the case can change the nature and character of such evidence, or ought to warrant its use as an inference of guilt in violation of fundamental rule above mentioned. And to do this is not only illogical, but submits the defendant to the very dangers, to guard against which the rule was originally created.

Moreover, the use in the above quotation of the phrase, "by seeking to prove the excellence of that character," conveys the thought at least that without proof of excellency of character, the defendant's character might still be said to be good, or something more than a negative quantity.

Continuing, the Supreme Court of New York argue (*id.* 349) :

"\* \* \* If, in addition to this adequate protection against the possibility of undue prejudice (referring to fact that bad character can not be proved unless defendant has made it possible to do so by first offering evidence of good character), the defendant is also shielded by an unassailable presumption of general good character, the prosecution may be placed in a position of unwarrantable disadvantage \* \* \*."

We question the statement that the right of a defendant merely not to have his character attacked or proven bad is an "adequate protection against the possibility of undue prejudice", unless the presumption of good character exists. Since we think of every person as having either a good or a bad character of varying degree; since we first inquire of one's character when he is arrested or charged with crime before forming opinion of guilt or innocence; and since it has been for a long time and is now the general custom among English speaking peoples at

least to presume every one to be of good character and to have at least the average qualities of morality and good conduct, we deny that a defendant in a criminal trial is adequately protected against undue prejudice at the hands of the jury, by keeping any reference to character out of the case, or by having the jury told that character has not been made an issue in the case and that there is no presumption either for or against the defendant on the subject. With a record silent as to character, the jury, which is nothing if not human, are most likely in determining the guilt or innocence of the defendant to consider on their own motion a defendant's character, and to speculate as to lack of character evidence and to be influenced in a way prejudicial to the defendant, though unintentionally and probably from lack of instructions on the subject. Especially is this most likely to happen where there are imputations of bad character conveyed by improper questions of the prosecuting attorney, which we complain of in the present case. Take the case where the jury are instructed that character is not an issue, and that there is no presumption for or against the defendant. This puts the defendant in a different situation as to character from that of a man not on trial. Since the jury have always been accustomed to presume everyone's character to be good, and because every man's character is either good or bad, they

are apt to infer the defendant's bad solely from lack of character evidence, and without the statement of the presumption of good character. But if the jury be told further that only the defendant can put character in issue, which has not been done, and that until then the prosecution can not attack the defendant's character, that is almost equivalent in practical effect to having the jury told that the defendant is of bad character. So we contend that no statement to the jury will adequately protect the defendant against the danger of undue prejudice at the hands of the jury, when there is no evidence on character, except to instruct that the defendant is presumed to be a person of good character.

Nor does the existence of such a presumption and its statement to the jury, we think, place the prosecution in a position of "unwarrantable disadvantage." Because the law never did sanction the use of bad character as the basis of inference to guilt. The presumption does not give the defendant the benefit of an excellent character nor have anything like the probative force of positive testimony of good character; but it merely tends to prevent the jury from drawing unfavorable inferences against the defendant because of lack of character evidence. And while the presumption of good character of itself does not place character in direct issue, which only the offering of affirmative evidence

can do, still the presumption might be said to be indirectly or collaterally involved. And to the extent that it is thus involved it can be indirectly and collaterally attacked by the prosecution introducing competent testimony to prove the defendant guilty beyond a reasonable doubt of the crime charged. And in this state of the case the presumption of good character is overcome, or, to put it in another way, the object of the prosecution has been accomplished, in spite of the presumption of good character.

What we have said above concerning the case of *People v. Lingley, supra*, will apply in large measure to the cases of *State v. Knotts*, 168 N. C. 173, 83 S. E. 972; *Addison v. People*, 193 Ill. 405; and *Knight v. State*, 70 Ind. 375, which cases are holdings contrary to the rule contended for by petitioner.

In *State v. Garrand*, 5 Or. 216, it is held:

“Evidence of good character when offered by a prisoner ought to be submitted to the consideration of the jury together with the other facts and circumstances of the case, to be weighed by them with the other evidence in the case, in determining the guilt or innocence of the accused.”

In discussing this rule, the Supreme Court of Oregon, speaking through BURNETT, J., say in part, at p. 224:

“ \* \* \* we consider that the law clothes the

*prisoner with the presumption of innocence and good character to begin with. \* \* \**” (Italics ours.)

In *Stephens v. State*, 20 Tex. App. 255, it is said :

“In view of the facts that the character of the defendant was not put in issue by the evidence, and that the trial court rejected evidence to the effect that the defendant was once arrested for robbery, it was a palpable abuse of the privilege of argument on the part of the counsel for the state to discuss the one and advert to the other in argument. See the statement of the case for a special charge as to the presumption of law concerning character, which, in view of the improprieties noted, should have been given in this case.”

The case was an indictment for murder and resulted in a conviction for manslaughter, the punishment assessed being two years in the penitentiary. The special charge referred to in the above syllabus of the court is as follows (*Id.*, p. 269) :

“The defendant asks the court to instruct the jury as follows: You are charged that the law presumes that the defendant has a good character, and you cannot presume against it because defendant failed to introduce evidence of a good character, and every presumption in favor of his innocence is indulged by the law.”

At p. 271 of the opinion, the court say, in part :

“It was improper in counsel for the state

to discuss the character of the defendant, as his character was not put in issue by the evidence, and it was likewise improper to inject into the case the fact that defendant had at one time been arrested for robbery, and still more improper for state's counsel to refer to this fact in his argument, when the court had excluded the evidence in relation to it. In view of these improprieties in the trial, *we think the court*, in order to prevent, as far as possible, any prejudice to the defendant by reason thereof, *should have given the jury the special charge requested by defendant's counsel, as to the presumption of the law concerning character.*"

We submit, therefore, that the overwhelming weight of authority in the state courts supports the existence of the presumption of good character in the absence of evidence on the subject.

**P o i n t 3 .** The decisions of the Federal Courts have uniformly recognized the existence of a presumption of ~~innocence~~ *good character*, with the exception of the decisions of the Eighth Circuit Court of Appeals in the cases of *Chambliss v. United States*, 218 Fed. 154, *Price v. United States*, 218 Fed. 149, and in the present case.

It is noteworthy that there are very few decisions of the Federal Courts upon the question as to whether or not a defendant in a criminal case, with-

out offering affirmative evidence of good character, is entitled on request to have the jury instructed that he is presumed to be a person of good character. This may be explained also by the fact that such a presumption seems to have been uniformly recognized by the Federal Courts, with the exception of the cases of *Chambliss v. U. S.*, 218 Fed. 154; *Price v. U. S.*, 218 Fed. 149, and the present case, 240 Fed. 320, by the Eighth Circuit Court of Appeals.

In *United States v. Neversen*, 1 Mackey 152, an instruction that the defendants, accused of murder, are presumed to have good characters up to the time of the alleged murder, and that this presumption remains in their favor, unless the jury shall believe from the evidence that they in fact were not entitled to such reputation, was held valid.

In *McKnight v. United States*, 97 Fed. 208, it is held:

“It is prejudicial error for a court to permit counsel for the prosecution, over objection, to comment in argument to the jury upon the failure of the defendant to offer evidence of his previous good character. *Such action*, with the express approval of the court, in effect *destroys the presumption of good character which the law raises in behalf of the defendant*, and permits the jury to infer that his character is bad, because he has not produced proof to the contrary.”

The above case is from the Circuit Court of Appeals for the Sixth Circuit, and the members of the court sitting were Mr. Justice DAY then Circuit Judge, the late Mr. Justice LURTON then Circuit Judge, and TAFT, Circuit Judge. The case involved an indictment under Sec. 5209 of the Revised Statutes, making penal certain acts of officers of national banks. The principal ground of exception urged by the plaintiff in error arose from exceptions taken to the remarks of the government's special counsel in connection therewith. The comments of counsel and the rulings of the court complained of grew out of the fact that the plaintiff in error had introduced no testimony on the trial tending to establish his previous good character. After setting up that portion of the bill of exceptions covering the comments of counsel and the rulings of the court referred to, the court, speaking through Mr. Justice DAY, at p. 210 of the opinion, in part say :

“It will thus be perceived that while *the court recognized the well established rule that, in the absence of testimony, the law presumes the accused to possess a good character*, it nevertheless permitted the counsel for the government to comment upon the want of such testimony. The court refused to check the counsel in this line of argument when objections were made by counsel for the accused, and in this connection said: ‘It is true, the law presumes that: but the prosecution may comment upon the ab-

sence of any evidence being presented upon that question.' Thereupon, under said permission, and over objections of the plaintiff in error, counsel proceeded to say: 'While the law presumes the defendant to be a man of good character, he does not have to rest upon this presumption. He can call his friends and neighbors to testify to his good character, but the prosecution could not call witnesses to attack his character until that was done. If he was a man of good character, why did he not call those friends and neighbors to prove it, and thus protect himself against these witnesses that his counsel have denounced as vultures? He did not stand like some poor mountain man—taken away from home and friends. He is at home, and, if he could prove himself to be a man of good character, why did he not do so?' The following day, the counsel having made comments on the standing and character of the prisoner, the court sustained the objection thereto, and required the counsel to withdraw the objectionable remarks, but permitted him to repeat his observations of want of testimony as to defendant's character, and, when asked to state to the jury that said comment was improper, said: 'The law presumes the defendant innocent until he has been proven guilty to the exclusion of a reasonable doubt. The law presumes his character to be good; but, as the defendant might introduce evidence of his good character, and did not, I think the district attorney can comment upon the fact that he has not.' Nowhere in the subsequent proceedings

or in the charge to the jury was anything said to qualify or change this ruling of the court. It amounted to an instruction to the jury that the effect of the failure of the accused to produce affirmative testimony of his previous good character might raise an inference against him as to his previous character and standing. Where the accused offers testimony in a criminal trial, seeking to show his previous good character such testimony is substantive proof in his behalf, which the jury may consider in determining the likelihood of the commission of the alleged crime. Such testimony may of itself, or with other testimony, raise that reasonable doubt which requires acquittal. Where no testimony is offered, the accused can rest upon the legal presumption of good character. The question in this case is: May he be required to rest upon that presumption, qualified by the argument of the prosecuting attorney, made with the approval of the court, urging the jury to consider that the accused could have introduced testimony, had he been able to do so, showing his good character? To permit such course of proceeding would be to deprive the accused of the legal presumption in his favor. The suggestion of counsel, thus approved by the court, may be more detrimental to the rights of the accused than any testimony which could be adduced against him. In effect, it not only destroys the presumption in his behalf, but permits an inference that his character is bad because he has not produced proof to the contrary. While there is some confusion, and per-

haps conflict, in the cases on the subject, sound principle, as well as the weight of authority, concurs in holding such comments, approved by the court, to constitute such substantial error as requires a reversal and new trial. The rule is well stated in 1 Bish. Cr. Proc., Sec. 1119:

‘It is the defendant’s privilege, not his duty, to open by evidence the question of his character. The expense, the remoteness of witnesses, confidence in his case, and other considerations would often dissuade him therefrom, however certain of success therein. Hence, and because the state may not show a character bad which the defendant had not put in issue, the omission of this evidence does not justify the presumption that it is not good; and neither counsel nor the judge has the right to argue to the jury that it does, nor should they assume anything against it while deliberating on their verdict.’

“To the same effect: *State v. Upham*, 38 Me. 261; *Fletcher v. State*, 49 Ind. 124; *Stephens v. State*, 20 Tex. App. 255; *State v. Dockstader*, 42 Iowa 436; *Ackley v. People*, 9 Barb. 610; *People v. White*, 24 Wend. 520; *People v. Evans*, 72 Mich. 367, 40 N. W. 473; *Pollard v. State*, (Tex. Cr. App.) 26 S. W. 70.”

. . . . .

“ \* \* \* For error in permitting the government’s counsel to comment in the manner set forth on the failure of the accused to produce evidence of his good character, and the observa-

tions of the court to the jury thereon, the case must be reversed, and remanded for a new trial."

In *Mullen v. United States*, 106 Fed. 892, it is held by the United States Circuit Court of Appeals for the Sixth Circuit, that "in a criminal trial in a federal court, where no testimony has been offered as to the previous character of the accused, a presumption of good character exists in his favor, of which, upon a request therefor, the jury should be instructed." Counsel wish to say that Instruction 3 as to good character (Tr., p. 39), requested and refused in this case, was copied from the opinion in the *Mullen* case. That case was before Mr. Justice DAY, then Circuit Judge, the late Mr. Justice LURTON, then Circuit Judge, and SEVERENS, Circuit Judge, and involved an indictment for a violation of Sec. 5508 of the Revised Statutes. The opinion was written by Mr. Justice DAY, who, in discussing the question whether a presumption of good character exists in favor of the accused, where no testimony of the previous good character of the accused has been offered, says, at p. 894, in part:

" \* \* \* Does such presumption exist? We fail to find any difference of opinion in the well recognized text writers upon this subject. All assert that a presumption exists in favor of the accused in the absence of testimony that he had a good character previous to the time of the al-

leged commission of the offense in question. It is true that the government may not attack the character of the accused until he puts it in issue by affirmative testimony on his part. He is not obliged to do this, but may, if he sees fit, rest upon the presumption raised by the law. Bishop states the doctrine thus:

‘The doctrine is that the defendant is presumed to be innocent, and his character to be at least of ordinary goodness.’ 1 Bish. New Cr. Proc. (4th ed.), Sec. 1112, par. 2.

“This philosophical writer couples the presumption of innocence with that of character. Underhill, in his late work on Criminal Evidence, states the law in the following terms:

‘The character of the accused means his reputation; *i. e.*, the general consensus of opinion regarding him, based on his deportment and conduct, which is held by his neighbors, friends and acquaintances. The accused may always prove his good character. If, however, he offers no evidence on this point, the law presumes he has a fair and respectable, if not, indeed, an excellent, character; and does not permit any presumption of guilt to arise from his silence, or from his failure to offer evidence on this point. That his character is bad can never be presumed, nor should the prosecution be permitted to comment unfavorably upon this omission.’ Sec. 76.

“We had occasion to examine this question under somewhat different circumstances than

those which arise in this case in the case of *McKnight v. U. S.*, 38 C. C. A. 115, 97 Fed. 210, where the trial court permitted the prosecutor to comment upon the failure of the accused to produce evidence of his good character, and argued that the jury could thereby draw the conclusion that such failure of proof showed a want of such character. We held such comment, when approved by the court, to be reversible error. It is true that there are cases which hold that, where there is no testimony upon the subject, the court is not obliged to say anything to the jury, either one way or the other. But, if the presumption exists in favor of the accused, it cannot be available to him unless he can have an instruction advising the jury of this proposition of law. This presumption, to the extent to which it exists, though less important, is as much his right in a criminal trial as the presumption in favor of his innocence. It is in consonance with the general principle of law that a man is presumed to stand ordinarily well, and to have at least the average qualities of morality and good conduct. Taking the charge of the court, together with the comments as to good character, above set forth, the jury were practically instructed that no presumption existed in favor of the good character of the accused; for the learned judge said that he did not think the jury were to be told that the defendants were presumed to be persons of good character, but, whether of good character or bad character, they were presumed to be innocent. This language affords the inference that this

presumption exists only in favor of innocence, and not of character. The court, without testimony on that subject, conveyed to the jury its impression that the character of the accused was such that it raised an inference of the likelihood of their participation in just such violations of law as were charged in the indictment. It is true that the learned judge said, in response to an exception upon this subject, that it might stand because well qualified, and that the jury would understand that they were not bound by it. Nevertheless, it was the comment of the court, without supporting testimony upon which to base it, and inconsistent with the presumption which the law raised in favor of the accused. \* \* \*

“Had there been testimony in this case warranting the comment, it would not have been error for the judge to have assisted the jury by such views as he entertained, leaving them free to decide disputed matters of fact for themselves. But the case was devoid, as we have seen, of testimony as to the character of the accused. Doubtless, the oppressive conduct of the accused, if the witnesses for the government are to be believed, in preventing the exercise of the right of suffrage on the part of those clearly entitled to that privilege, which was reprehensible in the extreme, had something to do with the comments of the learned judge, and prompted the suggestion that such men as the accused would be persons from whom such conduct might be expected. There was no testimony in the case to warrant these comments,

and, in their nature, they must be regarded as prejudicial to the accused in a high degree. We do not understand the practice in the federal courts, liberal as it is, to permit such comments outside of the testimony to go to the jury with the great weight which attaches to intimations of opinion from the judge. We think this comment, when coupled with the refusal to charge, as requested, upon the subject of character, practically destroyed the benefit of the presumption to which the accused were entitled. In this view of the case, we are constrained to reverse the judgment, and grant a new trial, without passing upon the other questions made in the case."

In *U. S. v. Breese*, 131 Fed. 915, it is held:

"The good character of a defendant, proved in a criminal case is evidence in his favor, which goes to strengthen the presumption of his innocence."

KELLER, D. J., in charging the jury, says at p. 926:

" \* \* \* but I do charge you that a good character proven in a case is evidence in favor of him who possesses it. It goes to augment the presumption of innocence which the law raises in behalf of a defendant, and it must be manifest that the man who, while presumed to be innocent, and *therefore presumed to have an ordinarily good character*, strengthens that character by the testimony of persons residing in the vicinity in which he lives, produces such

evidence as should tend to strengthen the presumption of his innocence, \* \* \* ." (Italics ours.)

In *United States v. Guthrie*, 171 Fed. 528, it is held:

"A person accused of crime is not required to call witnesses as to his general good character, but will be presumed to be of good character until such presumption is removed beyond a reasonable doubt."

The opinion is by SLATER, United States District Judge for the Southern District of Ohio. The indictment charges the defendant with re-using, without removing and destroying, the stamp which had been affixed at the distillery, as required by law, on a bottle containing whiskey. The court, at p. 532 of the opinion, says in part:

"The defendant is presumed to be innocent. The presumption of innocence runs in his favor as to every element of the crime charged, and abides with him throughout the case until removed beyond a reasonable doubt. *There is also in his favor a presumption of good character.* This presumption also runs in his favor throughout the case until removed by evidence of the character mentioned. He was not required to call any witnesses as to his general good character, and his failure to do so raises no presumption or inference that it was bad." (Italics ours.)

In *Lowdon v. United States*, 149 Fed. 673, it is held by the United States Circuit Court of Appeals for the Fifth Circuit:

“Where accused offered no evidence to prove his good character, and was therefore entitled to rely on a legal presumption that his character was good, it was prejudicial to accused for the prosecuting attorney, in making a strong appeal to the jury to assume that defendant’s character was bad because of his failure to prove the contrary, defendant’s objections thereto having been overruled, and the district attorney not having withdrawn the argument.”

In the opinion by SHELBY, Circuit Judge, it is said at p. 677:

“Having said this much in relation to the subject generally, we first consider an assignment of error made by Lowdon alone. *He offered no evidence to prove his good character. He unquestionably had the right to rely on the legal presumption that his character was good. Mullen v. United States*, 106 Fed. 892, 46 C. C. A. 22. The excerpt from the argument of the district attorney, numbered 1, is a strong appeal to the jury to presume that the character of Lowdon was bad because he failed to offer evidence that it was good. This was not only getting out of the record, *but going contrary to the legal presumption to which the defendant was entitled.* It was assuming that the defendant’s failure to offer such evidence created a

presumption that his character was bad. This was not a legitimate and proper argument, and, on objection being made, the trial court should have stopped the district attorney and should have taken steps to remove, as far as possible, its influence upon the jury. But it is urged on behalf of the government that, conceding that the argument was not legitimate, it does not constitute reversible error. It is true that in like cases where the court sustains the defendant's objection to the argument and the words are at once withdrawn, it is held that the injurious effect is removed, and the incident does not constitute ground for a new trial. *Dunlop v. United States*, 165 U. S. 486, 498, 17 Sup. Ct. 375, 41 L. ed. 799; *Wright v. United States*, 108 Fed. 805, 48 C.C.A. 37; *Kellogg v. United States*, 103 Fed. 200, 43 C. C. A. 179. But in this instance the district attorney did not withdraw the argument, and was sustained in making it by the action of the trial court. The principle which secures to everyone accused of crime a fair and impartial trial on the evidence adduced is violated when the court permits the district attorney, against objection, to comment in argument to the jury upon the failure of the defendant to offer evidence of his previous good character. *McKnight v. United States*, 97 Fed. 208, 38 C. C. A. 115; *Bennett v. United States*, 86 Ga. 401, 12 S. E. 806, 12 L. R. A. 449, 22 Am. St. Rep. 465; *Davis v. The State*, 138 Ind. 11, 37 N. E. 397; *Fletcher v. The State*, 49 Ind. 124, 19 Am. Rep. 673; *Thompson v. The State*, 92 Ga. 448, 17 S. E. 265; *The People v. Evans*, 72 Mich. 367, 40 N. W. 473." (Italics ours.)

In *Garst v. United States*, 180 Fed. 339, it is held by the United States Circuit Court of Appeals for the Fourth Circuit:

“Where the court in a criminal case instructed the jury that ‘the previous good character of defendants ought to be considered together with all the other facts in evidence,’ it was not error to refuse to charge further that ‘the law presumes that a man whose character is good is less likely to commit a crime than one whose character is not good,’ and, while the instruction was erroneous in assuming that previous good character was proven, the error was not prejudicial to defendant.”

The court speaking by KELLER, D. J., at p. 344, say:

“This assignment of error further complains of the action of the court in relation to the third instruction offered by the defendant below, which was offered as follows:

‘The court instructs the jury that the previous good character of the defendants ought to be considered together with all the other facts in evidence, in passing upon the question of their guilt or innocence of the charge, *for the law presumes that a man whose character is good, is less likely to commit a crime than one whose character is not good.*’

“The court struck out the words above italicized in the instruction, and gave the re-

mainder of it and this is assigned as error. We think there is no merit in this assignment of error for several reasons: The clause stricken out institutes a comparison between a man whose character has been proved good and one whose character is not good. There is no warrant for an instruction based upon such comparison, *because the law presumes that every defendant's character is good*, and the sole effect of evidence introduced by him tending to affirmatively show such good character is to strengthen the presumption of innocence which already exists in his favor by virtue of this presumption of law. The government is not allowed to show as a part of its case that any defendant's character is not good; and therefore, in our judgment, there is no warrant whatever for instituting in an instruction a comparison between the character of a man who has presented evidence tending to show that his character is good and a man whose character is not good." (Latter italics ours.)

The above language shows clearly that the Circuit Court of Appeals for the Fourth Circuit recognizes that a presumption of good character exists in favor of every defendant in a criminal case; and that such presumption is only strengthened by a defendant introducing testimony in support of his good character.

In *White v. U. S.*, 164 U. S. 100, it is held:

"A charge that the jury may consider de-

fendant's good character and give such weight to it as they see proper under all the evidence, and that he is entitled to a reasonable doubt, gives sufficient effect to evidence of his good character, although the court adds that the law presumes every defendant to have a good character."

The Supreme Court, speaking through Mr. Justice PECKHAM, at p. 104, say :

"As to the third ground, it appears by the record that the defendant offered to prove his good character for the last twenty years, whereupon the district attorney admitted his good character. All the evidence being in, the defendant prayed the court to charge the jury as follows: 'The evidence of good character, when established by the evidence in a case, taken in connection with all the other evidence, may generate a reasonable doubt of guilt of the defendant.' The court refused to give this charge, and the defendant excepted. The court in his oral charge said to the jury: 'It is admitted in this case that the defendants are men of good character, *the law presuming every defendant to have a good character*, and the jury may consider such good character and give it such weight as they see proper, under all the evidence in the case that defendant is entitled to a reasonable doubt.' *Assuming that the request stated the proper rule in regard to evidence of good character, we are of opinion that the charge, as given to the jury by the trial court, amounted in substance to the charge as requested.*

“When a jury has been properly instructed in regard to the law on any given subject, the court is not bound to grant the request of counsel to charge again in the language prepared by counsel, or if the request be given before the charge is made, the court is not bound to use the language of counsel, but may use its own language so long as the correct rule upon the subject requested be given. When the court told the jury it was admitted that the defendant was a man of good character, and that the jury might consider such good character and give such weight to it as they saw proper under all the evidence in the case, and that the defendant was entitled to a reasonable doubt, it was sufficient, although the court unnecessarily added that the law presumed every defendant to have a good character. The charge gave the jury the right to give weight enough to the evidence to generate a reasonable doubt of the guilt of the defendant, and a substantial compliance with the request was made, although not in the very words thereof.” (Italics ours.)

It is submitted that the language of the Supreme Court in the *White* case, *supra*, constitutes some recognition of the rule that every defendant is presumed to have a good character.

The case of *Christopoulos v. United States*, 230 Fed. 788, furnishes a striking illustration of the public inconvenience and harm which would result if, under the law, there were no presumption of good

character. In that case the United States Circuit Court of Appeals for the Fourth Circuit holds that the conviction on a plea of guilty of a violation of the act to regulate commerce by making false reports of the weight of certain articles shipped, did not of itself show that the person so convicted, who was a juror, was not a man of good moral character, within the requirement of section 275 of the Judicial Code, 36 Stat. 1164, requiring jurors in the United States Courts to have the same qualifications as jurors in the highest court in the state, and of article 5, section 22 of the Constitution of South Carolina, requiring every juror to be a qualified elector of good moral character, and of article 2, section 6 of said constitution, disqualifying persons convicted of certain distinct offenses. In reaching this conclusion the court resorts to the rule of law that every one is presumed to be of good moral character, unless the want of it is shown by the conviction of a disqualifying crime or is made to appear by evidence outside the record. In the opinion by KNAPP, Circuit Judge, at page 791, it is said:

“It is argued that the commission of this offense shows that Cart was not a man of good moral character, and therefore not qualified to serve as a grand juror. *But every elector must be presumed to be of good moral character, unless the want of it is manifested by conviction of a disqualifying crime or is made to appear by*

*evidence dehors the record.* True, it is provided in section 4036 of the Civil Code of South Carolina that:

‘If any person whose name is placed in the jury box is convicted of any scandalous crime, or is guilty of any gross immorality, his name shall be withdrawn therefrom by the board of jury commissioners, and he shall not be returned as a juror.’

“But this does not modify the standard of qualification fixed by the state constitution; it is merely a direction to the board that makes up the list of jurymen. If the board retains on the list the name of a person whose moral character is called in question, but who is otherwise a qualified elector, the presence of that person on the grand jury would not invalidate an indictment. *We think it obvious that this must be so, since a contrary conclusion would seriously impede the administration of justice.*” (Italics ours.)

The giving to every elector by the law of a presumption of “good moral character” is presuming character of a higher degree than only “good character.” And if there is a presumption of good moral character in favor of every elector, we do not see how, and for what reason, an elector after indictment is or should be deprived of the benefit of that presumption. To make any such contention

would be contrary to the principles of criminal jurisprudence which have obtained in England and America for many centuries, and a serious step toward adopting the system which exists in France that the defendant's character can always be attacked by the prosecution by evidence of general reputation, and of specific crime or acts of wrongdoing.

We wish to refer briefly to the case of *Fields v. United States*, 27 App. D. C. 433, in which a writ of *certiorari* was refused by this honorable court in 205 U. S. 292, because this case has been cited by some of the recent text writers in support of the proposition that there is no presumption of good character. At the trial *Fields*, who had offered no evidence of good character, requested an instruction that "the law presumes the defendant to be an upright, honest man of integrity and good character, and they are bound to assume him to be such a man in the consideration of the evidence." After this statement the court by Mr. Chief Justice SHEPARD, say:

" \* \* \* Assuming that he was entitled to demand an instruction that good character is to be presumed, even when no issue is made thereon, the one offered went much farther than that, if it requires, in addition, that he shall be presumed to be 'an upright, honest man of integrity' also, throughout the consideration of the

evidence. We are of the opinion, however, that the court is not required to give an instruction on anything that has not been up in issue. \* \* \*

The opinion then proceeds to state that all the defendant was entitled to was a charge upon the presumption of innocence, and the necessity of the Government to overcome that presumption by proof of guilt beyond a reasonable doubt. The court finding that such an instruction was given finally says that the authorities relied on by the defendant do not go so far as to hold that the accused is entitled to such a charge as was asked, under all circumstances.

From the above language it appears that Chief Justice SHEPARD assumes that Fields was entitled to demand an instruction that good character was to be presumed, which is all we are contending for here. It is also readily apparent that the court treated the instruction requested as going farther than an instruction that good character is to be presumed. Of course, the later assertion that all the defendant was entitled to was a charge upon the presumption of innocence and the necessity of the Government to overcome that presumption by a proof of guilt beyond a reasonable doubt is *obiter dictum*, and is in direct conflict with the assumption previously made that the defendant was entitled to demand an instruction that good character is to

be presumed. Therefore, so far as the case amounts to a decision, it is not in conflict with the contention that there is a presumption of good character in favor of defendant where no evidence is offered on the subject. Consequently, the denial of the writ of *certiorari* by this court in 205 U. S. 292, without any discussion of the question of character, is not in any sense contrary to petitioner's contention herein.

The only cases that hold contrary to the contention of petitioner are the cases of *Chambliss v. United States*, 218 Fed. 154; *Price v. United States*, 218 Fed. 149, and the present case, 240 Fed. 320, all of which are by the United States Circuit Court of Appeals for the Eighth Circuit. It is noteworthy that all three of these cases were presented to the same court, Hook and SMITH, Circuit Judges, and AMIDON, District Judge, and that in all three of the decisions Hook, Circuit Judge, and AMIDON, District Judge, held that there is no presumption of good character in favor of the defendant where he offers no evidence on the subject, while SMITH, Circuit Judge, dissented on the ground that such a presumption does exist. However, the three cases have succeeded in getting the opinions of only two Circuit Judges out of five in the Eighth Circuit. In view of the discussion heretofore made, counsel think it unnecessary to discuss further the cases from the

Eighth Circuit. In conclusion, therefore, counsel submit that the federal decisions, with the exception of the *Chambliss, Price* and the present case, all support the rule that defendant is presumed to be a person of good character in the absence of any evidence on the subject.

**Point 4.** The rule of the common law in force at the time of the adoption of the judiciary act of 1789 controls as to all questions of evidence in criminal trials in the Federal Court, and under the common law the defendant in a criminal case, where no evidence was offered on the subject, was presumed to be a person of good character.

That state laws are not applicable to criminal prosecutions in the Federal Courts, and that the rules of evidence applicable to such prosecutions are to be determined by the rule of the common law at the time of the adoption of the Judiciary Act of 1789, has been decided by this court in the cases of *United States v. Reid*, 53 U. S. 361, 12 How. 361, 13 L. ed. 1023; *Benson v. United States*, 146 U. S. 334, 36 L. ed. 995; *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429; *Donnelly v. United States*, 228 U. S. 343, 57 L. ed. 820.

In the case of *Benson v. United States*, *supra*, which involved the question of the competency of the co-defendant as a witness for the Government,

the common law rule that such co-defendant was a competent witness was followed, though the question was examined by this court in the light of general authority and sound reason also. This case probably intimates that the common law rule might not necessarily be followed, if it does not accord with general authority and sound reason. But we contend that the rule of law which presumes good character not only was the common law rule, but also that it is in accord with general authority and sound reason.

The common law rule may be shown by text writers as well as adjudicated cases. Also the opinion of the early American text writers should have more weight than writers of the present day, for the reason that, since the common law rule at the time of the adoption of the Judiciary Act in 1789 is the criterion in the case, the early writers will be presumed to have been better versed in the state of the common law than writers of today, and are less likely to have been influenced by state legislation or decisions based on such legislation.

But, since under the decisions of this court above cited, the rules of the common law in force at the time of the adoption of the Judiciary Act of 1789 obtain and control in criminal trials in the Federal Courts, we respectfully submit that the decisions of the Federal Courts themselves constitute the best

evidence of what was the rule of the common law in 1789 as to the presumption of good character; and that since all the decisions of the Federal Courts since 1789 have uniformly supported the existence of such a presumption under the condition named (excepting, of course, the three cases from the Eighth Circuit), therefore such a presumption existed under the common law in 1789 and should continue to be enforced as such in the Federal Courts.

That good character may generate a reasonable doubt, has been decided in *Edgington v. United States*, 164 U. S. 361, 366, and in *Rowe v. United States*, 97 Fed. 779, 780. Therefore, the failure of the court to state the presumption of good character to the jury, when requested, deprived the petitioner of the benefit of such presumption in the trial of the case (*Coffin v. United States*, 156 U. S. 432, and *Mullen v. U. S.*, 106 Fed. 892); and for that reason the judgment herein should be reversed.

**Point 5.** Irrespective of general authority and of the common <sup>Law</sup> rule, sound reason and public policy require that a defendant be presumed to be a person of good character in a criminal trial in the Federal Court, in the absence of evidence of good character.

Our argument under Points 1 to 4, inclusive, *supra*, has, we hope, already proven the correctness

of this statement; and we shall not take the time to repeat here the various arguments heretofore advanced in support of the presumption of good character. We shall, therefore, close with a few brief observations.

Before 1670 the accused's prior record of misconduct could be considered. 1 Wigmore on Evidence, Sec. 194, note 1. That this rule of admission was gradually changed at common law to a rigid rule of exclusion furnishes the best proof that the latter rule is the result of centuries of experience and is based on sound reason. The history of the development of the rules pertaining to bad character evidence is just the opposite of the history of the development of the rules concerning that of good character. Prior to 1800, the good character of a defendant was admissible only in capital cases, and then, probably, only in doubtful cases. 1 Wigmore on Evidence, Sec. 56. But these limitations have disappeared and good character is now admissible in all criminal cases, regardless of the state of the evidence. *Edgington v. United States*, 164 U. S. 361, 41 L. ed. 467. To give effect to these rules, the presumption of good character is necessary to relieve a defendant of good character from the necessity and expense of always offering affirmative evidence of good character, though it is more necessary to protect a defendant of bad character (one who there-

fore could not bring affirmative evidence of good character) against the probability of the jury inferring bad character from lack of evidence on the subject, and being induced thereby to convict without sufficient evidence of guilt, in violation of the rule, *supra*, that bad character shall never be used as inference of guilt.

Thus the presumption of good character has for its chief purpose the protection of a defendant with bad character, not in the sense, however, that the presumption shall be used as a sword in his hands to overcome the case of the prosecution against him, but rather in the sense that such presumption shall be a shield to protect him against the unfavorable inferences of the jury from lack of evidence of good character. Indeed, the presumption can never be said to amount to a sword to avoid conviction, because, when proof beyond a reasonable doubt of the defendant's guilt of the crime charged is made by competent testimony (and the law <sup>not</sup> does recognize lack of character or bad character as competent testimony of such guilt), the defendant may be convicted and justice is done, notwithstanding the presumption of good character.

In conclusion, therefore, it is respectfully submitted that in a criminal trial in the Federal Court, where no testimony has been offered as to the previous character of the accused, a presumption of good character exists in his favor, of which, upon a request therefor, the jury should be instructed; that the cross examination of the petitioner by the United States Attorney (Tr., p. 27) amounted to an imputation that the petitioner's character was bad; and that the denial of petitioner's requested instructions that he was presumed to be a person of good character constitutes, under the circumstances in the present case, such prejudicial error as warrants the reversal of the judgment and sentence of the District Court.

Respectfully submitted,

JAMES C. DENTON,  
FRANK LEE,  
Muskogee, Oklahoma,  
*Attorneys for Petitioner.*

## INDEX AND SUMMARY.

	Page.
CONTENTS INVOLVED.....	1
I. The case of <i>Sandy White v. United States</i> (1896), 164 U. S., 100, disposes of the appellant's contention.....	2
II. The weight of authority is opposed to the appellant's contention.....	4
III. A defendant in a criminal case is not entitled to an instruction to the jury to the effect that a presumption of good character exists in his favor, when no comment has been made by the Government or the court on defendant's failure to produce evidence as to his good character; such an instruction is not compatible with the other principles of criminal law.....	10
IV. The State court cases cited by the appellant do not support his contention.....	24
V. The Federal court cases cited by appellant do not, when analyzed, fully support his contention.....	27
VI. The textbook writers cited by the appellant in support of his contention of the existence of a presumption of good character sustain his contention only by loose statements; but the cases cited by the textbook writers only support the text to the extent set forth in this brief <i>supra</i> . The texts as to this subject are to be received with caution and their foundation carefully inspected..	35
VII. A presumption of good character, even if there be such a presumption known to the law, is not evidence for the defendant, and an instruction that it constitutes such evidence is not warranted on proper legal principles..	36
CONCLUSION.....	42

### CITATIONS.

#### CASES.

<i>Ackley v. People</i> (1850), 9 Barb. (N. Y.) 609, 610 .....	9, 25
<i>Addison v. People</i> (1901), 193 Ill. 405.....	7, 19
<i>Agnew v. United States</i> (1897), 165 U. S. 36, 51, 52.....	36
<i>Allen v. United States</i> (1896), 164 U. S. 492, 500.....	36
<i>Bennett v. State</i> (1890), 86 Ga. 401.....	8
<i>Biester v. State</i> (1902), 65 Nebr. 276.....	8
<i>Chambliss v. U. S.</i> 218 Fed. 154, 161.....	16
<i>Cluck v. State</i> (1872), 40 Ind. 263, 270.....	8
<i>Cochran and Sayre v. United States</i> (1895), 157 U. S. 286, 299.....	36

## II

	Page
<i>Coffin v. United States</i> (1895), 156 U. S. 432.....	14, 29, 30, 36, 39
<i>Coffin v. United States</i> (1896), 162 U. S. 664.....	39, 40
<i>Coggan v. Monroe</i> (1860), 31 Ga. 331.....	8
<i>Commonwealth v. Webster</i> (1850), 5 Cush. (Mass.) 295, 320.....	9
<i>Danner v. State</i> (1875), 54 Ala. 127.....	7
<i>Davis v. United States</i> (1895), 160 U. S. 469, 486.....	13, 36
<i>Donoghoe v. People</i> (1867), 6 Parker's Cr. Rep. (N. Y.) 120.....	9
<i>Dryman v. State</i> (1893), 102 Ala. 130, 135.....	7
<i>Deuel v. State</i> (1901), 63 Kans. 811, 818.....	9
<i>Fields v. United States</i> (1906), 27 App. D. C. 433, 449.....	31
<i>Fletcher v. State</i> (1874), 49 Ind. 124, 134.....	8
<i>Garst v. United States</i> (C. C. A. 4th Circ. 1910), 180 Fed. 339, 344, 345.....	7, 33
<i>Gates v. State</i> (1904), 141 Ala. 10.....	7
<i>Griffin v. State</i> (1909), 165 Ala. 29, 49.....	7
<i>Hardt's v. People</i> (1886), 67 Wis. 552, 557.....	10
<i>Holt v. United States</i> (1910), 218 U. S. 245, 253.....	38
<i>Kirby v. United States</i> (1899), 174 U. S. 47, 55.....	36
<i>Knight v. State</i> (1880), 70 Ind. 375, 380.....	7, 8
<i>Little v. State</i> (1877), 58 Ala. 265, 267.....	7
<i>Lowden v. United States</i> (C. C. A. 5th Circ. 1906), 149 Fed. 673, 677..	8, 32
<i>Maine v. Upham</i> (1854), 38 Maine, 261.....	9, 26
<i>McKnight v. United States</i> (C. C. A. 6th Circ. 1899), 97 Fed. 208, 211	8, 27, 29, 30
<i>McQueen v. State</i> (1882), 82 Ind. 72.....	7
<i>Mullen v. United States</i> (C. C. A. 6th Circ. 1901), 106 Fed. 892..	7, 28, 30, 31, 32
<i>Newsom v. State</i> (1894), 107 Ala. 133.....	9
<i>Olive v. State</i> (1881), 11 Nebr. 1, 29.....	9
<i>Ormsby v. People</i> (1873), 53 N. Y. 472, 475.....	9
<i>People v. Bodine</i> (1845), 1 Denis (N. Y.) 281, 314.....	9, 24, 25
<i>People v. Evans</i> (1888), 72 Mich. 367, 381.....	9
<i>People v. Fair</i> (1872), 43 Cal. 137.....	8
<i>People v. Gleason</i> (1898), 122 Cal. 370, 371.....	8, 11
<i>People v. Griffith</i> (1905), 146 Cal. 146, 339.....	7, 12
<i>People v. Johnson</i> (1882), 61 Cal. 142.....	6, 7, 18
<i>People v. Kemmis</i> (1908), 153 Mich. 117.....	7
<i>People v. Lingley</i> (1913), 207 N. Y. 396.....	7, 17
<i>People v. Shepardson</i> (1875), 49 Cal. 629.....	9
<i>People v. Von Graasbeck</i> (1907), 189 N. Y. 408.....	10
<i>People v. White</i> (1840), 24 Wendell (N. Y.) 520.....	9
<i>Price v. United States</i> (C. C. A. 8th Circ. 1914), 218 Fed. 149, 151 ..	7, 15, 22
<i>Sandy White v. United States</i> (1896), 164 U. S. 100.....	2, 3
<i>State v. Carr &amp; Smith</i> (1904), 4 Penn. (Del.) 523, 526.....	9
<i>State v. Dockstader</i> (1876), 42 Iowa, 436.....	8
<i>State v. Ford</i> (1839), 3 Strob. L. R. note (So. Car.) 517.....	7
<i>State v. Kabrich</i> (1874), 39 Iowa, 277.....	8
<i>State v. McAllister</i> (1844), 24 Maine, 139, 144.....	9
<i>State v. O'Neal</i> (1847), 7 Iredell Law (N. C.) 251.....	9

### III

<i>State v. Pipe</i> (1902), 65 Kan. 543.....	Page 9
<i>State v. Saunders</i> (1881), 84 (N. C.) 723, 731.....	9
<i>State v. Smith</i> (1892), 50 Kans. 69, 78.....	7
<i>State v. Snow</i> (1901), 3 Penn. (Del.) 259, 262.....	9
<i>State v. Williams</i> (1904), 122 Iowa, 115.....	8
<i>United States v. Freeman</i> (1827), 4 Mason, 505.....	9
<i>United States v. Guthrie</i> (1909), 171 Fed. 528.....	8, 32
<i>United States v. Jones</i> (1887), 31 Fed. 718, 724.....	9
<i>United States v. Neverson</i> (1880), 1 Mack (D. C.) 152, 158.....	8
<i>United States v. Smith</i> (1914), 217 Fed. 839.....	7, 16

#### TEXT BOOKS AND MISCELLANEOUS REFERENCES.

Bentham on Judicial Evidence (1823).....	5
Best on Presumption, p. 64.....	5
Best's Presumptions of Law and Fact (1845).....	5
Best's Principles of the Law of Evidence (1883).....	5, 13
Bishop's New Criminal Procedure.....	21, 27, 29, 30, 36
Chamberlayne on Evidence (1911).....	6, 39
Criminal Law Magazine (January 1889, Vol. II).....	39
Encyclopædia of Evidence (1906) Vol. III, p. 34, Vol. IX, p. 927...	35
Gilbert on Evidence (1801).....	5
Greenleaf on Evidence (1842).....	6
Jones's Commentaries on Evidence (1913) Vol. I, sec. 148a.....	36
Lawson on Presumptive Evidence (1885).....	6
Lawyers' Reports Annotated, vol. 46 (new series) p. 343.....	23
London Law Magazine (November 1855).....	12
McNally on Rules of Evidence on Pleas of the Crown (1811).....	5
Monthly Law Reporter (January 1856, p. 481).....	12
Rice on Evidence (1893) Vol. III, p. 597.....	35
Starkie on Evidence (6th American Edition, 1837, p. 686).....	4, 5
Stephen's Digest of the Law of Evidence (1877).....	5
Taylor on Evidence (1872).....	5
Thayer's Preliminary Treatise on Evidence (1898) Appendix B. pp. 550 et seq.....	39, 40
Thayer's Article in Yale Law Journal, Vol. III.....	39
Underhill's Criminal Evidence.....	29, 30, 35
Wharton's Criminal Evidence (10th Edition) sec. 57.....	35
Wigmore on Evidence (1904).....	6, 10, 13, 19, 20, 21
Wigmore's Treatise on the System of Evidence in Trials at Common Law (1905) Vol. IV, sec. 2511.....	39
Will's Essay on the Rationale of Circumstantial Evidence (1843)....	5

# In the Supreme Court of the United States.

OCTOBER TERM, 1917.

---

J. KNOX GREER, PETITIONER,	}	No. 504.
v.		
THE UNITED STATES.		

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

---

## BRIEF FOR THE UNITED STATES.

---

### THE QUESTION INVOLVED.

The defendant in this case introduced no evidence as to his good character. Neither the United States attorney nor the trial judge made any comment on the defendant's character or on his failure to prove good character.

The trial judge charged the jury fully and accurately upon the principles of innocence, as follows (Record 36):

To this indictment the defendant has entered his plea of not guilty. That puts upon the Government the burden of establishing his guilt as charged in the indictment to your satisfaction beyond a reasonable

doubt. The defendant is presumed to be innocent of this charge until his guilt is so established and that presumption follows him throughout the trial until so overcome.

The defendant asked for five additional instructions which in general set forth that the defendant is presumed to be a person of good character and that this presumption should be considered in his favor in determining his guilt or innocence. (Record 38, 39.)

Instruction No. 3 as requested introduced a further element, i. e., that the presumption should be considered *as evidence* in defendant's favor:

You are instructed that the law presumes the good character of the accused *and such presumption is to be considered as evidence* in favor of the accused in considering the question of his guilt or innocence.

The case presents, therefore, two questions: Under the circumstances of this case, was the defendant entitled to an instruction that the law presumed him to be a person of good character? If such a presumption existed, was it to be considered by the jury as evidence in favor of the defendant?

# I.

**The case of *Sandy White v. United States* (1896), 164 U. S. 100, disposes of the appellant's contention.**

The Government contends that this Court appears to have already refused to acknowledge the existence of the presumption of good character asserted by the appellant.

In *Sandy White v. United States* (1896), 164 U. S. 100, this court states the third ground of alleged error as follows (p. 104):

As to the third ground, it appears by the record that the defendant offered to prove his good character for the last twenty years, whereupon the district attorney admitted his good character. All the evidence being in, the defendant prayed the court to charge the jury as follows: "The evidence of good character, when established by the evidence in a case, taken in connection with all the other evidence, may generate a reasonable doubt of the guilt of the defendants." The court refused to give this charge and the defendant excepted. The court in its oral charge said to the jury: "It is admitted in this case that the defendants are men of good character, the law presuming every defendant to have a good character, and the jury may consider such good character and give it such weight as they see proper, under all the evidence in the case, that defendant is entitled to a reasonable doubt."

It was *held* that there was no error—

When the Court told the jury it was admitted that the defendant was a man of good character, and that the jury might consider such good character and give such weight to it as they saw proper under all the evidence in the case, and that the defendant was entitled to a reasonable doubt, it was sufficient, *although the court unnecessarily added that the law presumed every defendant to have a good character.*

The charge gave the jury the right to give weight enough to the evidence to generate a reasonable doubt of the guilt of the defendant, and a substantial compliance with the request was made, although not in the very words thereof. [I alics ours.]

This Court states that the trial court "unnecessarily added that the law presumed every defendant to have a good character"; but if the instruction as to presumption by the trial court was an unnecessary statement, it would seem that the defendant in that case would have had no right to ask for such an instruction, and that equally in the case at bar he has no such right.

It may be argued for the appellant, however, that this court only considered the statement in the *White case* to be made "unnecessarily" because of the fact that the Government had in that case already admitted the defendant's good character. If such be the construction to be placed on this Court's remark, the Government contends that on general principles of law and on the clear weight of authority no such presumption exists as the appellant contends for.

## II.

**The weight of authority is opposed to the appellant's contention.**

With the exception of a very general loose phrase in Starkie on Evidence, no trace is to be found in the English cases or in the English textbook writers of the existence of the doctrine of the presumption of

good character as a distinct and separate presumption from the presumption of innocence.

Neither Gilbert on Evidence (1801), MacNally on Rules of Evidence on Pleas of the Crown (1811), Bentham on Judicial Evidence (1823), Will's Essay on the Rationale of Circumstantial Evidence (1843), Best's Presumptions of Law and Fact (1845), Best's Principles of the Law of Evidence (1883), Taylor on Evidence (1872), nor Stephens's Digest of the Law of Evidence (1877) mention the existence of any presumption of good character.

Starkie on Evidence (6th American edition, 1837, p. 686) mentions good character in the following very general phrase, citing no authority, and it is to be noticed that he connotes good character with innocence:

Thus the law always presumes in favor of innocence as that a man's character is good until the contrary appears, or that he is innocent of an offense imputed to him until his guilt be proved.

Best on Presumption, page 64, states that—

It is a *præsumptio juris* running through the whole law of England that no person shall in the absence of criminative proof be supposed to have committed any violation of the criminal law—

but this is of course a statement of the presumption of innocence, not of a presumption of good character.

The alleged doctrine of the presumption of good character distinct from the presumption of innocence

is of solely American origin. So far as the doctrine is found in any State courts, its source may be traced to a certain expression used in a New York case in 1845, a case which did not, however, contain any decision as to the existence or nonexistence of such a presumption. In the Federal courts, the doctrine was enounced for the first time in 1901 in the Circuit Court of Appeals for the Sixth Circuit.

The growth of the doctrine has been fostered by loose statements made in certain American textbooks, based on citations of cases which did not support the statements in the texts. Greenleaf (1842), however, makes no mention of the existence of the presumption of good character. Lawson on Presumptive Evidence (1885) includes under the heading of "The presumptions in favor of innocence," rule 90, as to the presumption of innocence, with a subrule 2, to the effect that "good character is presumed," citing *People v. Johnson*, 61 Cal. 142 (1882), a case which sustains the Government's contention in the case at bar. Wigmore (1904) and Chamberlayne (1911) expressly deny the existence of any such presumption.

For convenience of reference, the cases on the subject of presumption of good character are here collected.

A. Cases holding that a defendant in a criminal case is not entitled to an instruction that there is a presumption of good character in his favor:

(1) Federal:

*Price v. United States* (C. C. A., 8th Circ., 1914), 218 Fed., 149, 151;

*United States v. Smith* (1914), 217 Fed. 839.

(2) State:

*Danner v. State* (1875), 54 Ala. 127;

*Little v. State* (1877), 58 Ala. 265, 267;

*Dryman v. State* (1893), 102 Ala. 130, 135;

*Gates v. State* (1904), 141 Ala. 10;

*Griffin v. State* (1909), 165 Ala. 29, 49;

*People v. Johnson* (1882), 61 Cal. 142;

*People v. Griffith* (1905), 146 Cal. 339;

*Addison v. People* (1901), 193 Ill. 405;

*Knight v. State* (1880), 70 Ind. 375, 380;

*McQueen v. State* (1882), 82 Ind. 72;

*State v. Smith* (1892), 50 Kans. 69, 78;

*People v. Kemmis* (1908), 153 Mich. 117;

*People v. Lingley* (1913), 207 N Y. 396;

*State v. Ford* (1839), 3 Strob. L. R. note (So. Car.), 517.

B. Cases holding that defendant is entitled to such instruction:

(1) Federal:

*Mullen v. United States* (C. C. A., 6th Circ., 1901), 106 Fed. 892;

*Garst v. United States* (C. A. A., 4th Circ., 1910), 180 Fed. 339, 344, 345.

## (2) State:

*People v. Fair* (1872), 43 Cal., 137 (obiter);  
*Cluck v. State* (1872), 40 Ind. 263, 270 (obiter);

*Fletcher v. State* (1874), 49 Ind. 124, 134 (obiter, overruled by *Knight v. State*, 70 Ind. 375);

*United States v. Neverson* (1880), 1 Mack. (D. C.), 152, 158 (obiter);

*Biester v. State* (1902), 65 Nebr. 276 (obiter, question of costs).

C. Cases in which presumption of good character is mentioned, but in which the actual point involved and decided was that failure by a defendant to produce evidence as to his character raises no presumption that it was bad, and is not to be considered as against the accused, and that such failure may not be commented upon or argued to the jury by the prosecution or by the trial judge:

## (1) Federal:

*McKnight v. United States* (C. C. A., 6th Circ. 1899), 97 Fed. 208, 211;

*Lowden v. United States* (C. C. A., 5th Circ. 1906), 149 Fed. 673, 677;

*United States v. Guthrie* (1909), 171 Fed. 528.

## (2) State:

*People v. Gleason* (1898), 122 Cal. 370, 371;

*Coggan v. Monroe* (1860), 31 Ga. 331;

*Bennett v. State* (1890), 86 Ga. 401;

*State v. Kabrich* (1874), 39 Iowa, 277;

*State v. Dockstader* (1876), 42 Iowa, 436;

*State v. Williams* (1904), 122 Iowa, 115;

*Maine v. Upham* (1854), 38 Maine 261; see, however, *State v. McAllister* (1844), 24 Maine 139, 144, contra;

*People v. Evans* (1888), 72 Mich. 367, 381;

*Olive v. State* (1881), 11 Nebr. 1, 29;

*People v. White* (1840), 24 Wendell (N. Y.), 520;

*People v. Bodine* (1845), 1 Denio (N. Y.), 281, 314;

*Ackley v. People* (1850), 9 Barb. (N. Y.), 609, 610;

*Donoghoe v. People* (1867), 6 Parker's Cr. Rep. (N. Y.), 120;

*Ormsby v. People* (1873), 53 N. Y. 472, 475;

*State v. O'Neal* (1847), 7 Iredell Law (N. C.), 251;

*State v. Saunders* (1881), 84 N. C. 728, 731.

D. Cases in which the point decided was simply the admissibility or relevancy of evidence to show good character, and in which general expressions were used as to a presumption of good character:

(1) Federal:

*United States v. Freeman* (1827), 4 Mason, 505; *United States v. Jones* (1887), 31 Fed. 718, 724.

(2) State:

*Newsom v. State* (1894), 107 Ala. 133; *People v. Shepardson* (1875), 49 Cal. 629; *State v. Snow* (1901), 3 Penn. (Del.) 259, 262; *State v. Carr & Smith* (1904), 4 Penn. (Del.) 523, 526; *Deuel v. State* (1901), 63 Kan. 811, 818; *State v. Pipes* (1902), 65 Kan. 543; *Commonwealth v. Webster* (1850), 5 Cush. (Mass.) 295, 320,

324; *People v. Von Graasbeck* (1907), 189 N. Y. 408; *Hardtke v. People* (1886), 67 Wis. 552, 557.

It will be seen that expressions as to presumption of good character when used by the court in cases in Class C and Class D were purely *obiter dicta*, as the existence of such a presumption was not a question involved in such cases. In Class C, the defendants took exception, not to failure of the trial judge to instruct as to the existence of a presumption of good character, but to comments made by the prosecutor or trial judge on the failure of the defendant to introduce character evidence. In Class D, the rulings excepted to were simply on the admissibility of evidence as to character.

### III.

**A defendant in a criminal case is not entitled to an instruction to the jury to the effect that a presumption of good character exists in his favor, when no comment has been made by the Government or the court on defendant's failure to produce evidence as to his good character; such an instruction is not compatible with the other principles of criminal law.**

(1) A defendant's "good character" in a criminal case is not an issue in the case on the pleadings; but testimony as to his good character, if introduced by the defendant, may be evidential on the issue of his guilt or innocence. "A defendant's character, then as indicating the probability of his doing or not doing the act charged, is essentially relevant." (Wigmore's Evidence, secs. 54, 55.)

When this distinction between character as an issue and character as an evidentiary fact is firmly borne in mind, the difference between the alleged presumption of good character and the established presumption of innocence is at once plain. The latter is a presumption relative to an issue in the case, viz., guilt or innocence, and it operates to control the evidentiary facts introduced by the Government bearing on the issue. The former alleged presumption, if stated to the jury without any introduction by the defendant of evidence as to his character, would constitute an instruction to the jury on a matter which is neither an issue in the case nor in evidence before them.

A defendant is not entitled to an instruction as to something on which neither side has introduced evidence and which is not in issue. As the court said in *People v. Gleason* (1898), 122 Cal. 370, 372: "As there was no evidence before the jury relating to the subject matter of this instruction, the court was not justified in giving it to them, even if there could be any occasion upon which the instruction could be properly given to a jury. A jury should be instructed upon the evidence which has been admitted for their consideration, and not with reference to what would be their duty if they had an opportunity to consider evidence which had not been admitted. Instruction upon abstract rules of law which have no application to the evidence in a case tend to confuse rather than enlighten a jury,

and should not be given." (See also *People v. Griffith* (1905), 146 Cal. 339, 345.)

(2) The only presumptions known to the law are conclusive presumptions and disputable or rebuttable presumptions. The distinction is well set forth in an able article in the *London Law Magazine* (November, 1855) quoted in the *Monthly Law Reporter* (January, 1856, p. 481):

(P. 489): Legal presumptions are of two kinds—conclusive and disputable, or such as may be controverted. Of conclusive presumptions, there are not many which apply, save incidentally in criminal inquiries; then, indeed, arbitrary presumptions should be very sparingly acted upon, because human actions can not safely be judged by reference to unbending rules—and it would, moreover, be counter to the spirit of our constitution to require juries to act in accordance with, and pay implicit obedience to, such rules.

(P. 491): \* \* \* The second branch of legal presumptions comprises those which are disputable, to which the maxim applies: *Stabit presumptio donec probetur in contrarium*. The presumption will here take effect, and may even decide a criminal case, if uncontradicted; though it seems reasonable that presumption, not being founded on the basis of certainty, should yield to evidence, which is the test of truth. \* \* \* Of disputable presumptions, perhaps, the most universally applicable in criminal courts is that in favor of the innocence of the accused of crime.

(P. 493:) Conclusive presumptions are indeed but arbitrary rules of law, the policy of which is open to discussion; though they can hardly be said under any circumstances to work injustice, inasmuch as their existence is known and understood beforehand, and they operate impartially against all.

Conclusive presumptions are not favored by modern courts; and as Best, in his *Law of Evidence*, section 307, long ago stated:

On the whole, modern courts of justice are slow to recognize presumptions as irrebuttable, and are disposed rather to restrict than to extend their number. To preclude a party by an arbitrary rule from adducing evidence, which, if received, would compel a decision in his favor, is an act which can only be justified by the clearest expediency and soundest policy; and some presumptions of this class ought never to have found their way into it.

See also *Davis v. United States* (1895), 160 U. S. 469, 486.

In fact, later writers, like Wigmore (*Evidence*, Vol. IV, sec. 2992), claim that a "conclusive" presumption is not strictly a presumption at all.

In strictness there can not be such a thing as a "conclusive presumption." Wherever from one fact another is conclusively presumed, in the sense that the opponent is absolutely precluded from showing any evidence that the second fact does not exist, the rule really provides that where the first fact is shown to exist, the second fact's existence is wholly

immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with the evidence. The term has no place in the principles of evidence (although the history of a "conclusive presumption" often includes a genuine presumption as its earlier stage), and should be discarded.

In the case at bar, if any such presumption of good character exists as the appellant contends, it must be a conclusive presumption, and thus a stronger presumption than that of innocence, which is rebuttable.

This Court, in *Coffin v. United States* (1895), 156 U. S. 432 (p. 458), defines the presumption of innocence as "a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty." In the same phraseology, a presumption of good character, if such presumption really exists, would be stated to be "a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be deemed to be of good character, unless he is proven to be of bad character." But thus phrased, it is at once apparent that the alleged presumption must be a conclusive presumption, except in a case where the defendant introduces evidence of his good character, for it is only in such cases that

the Government may ever introduce evidence to disprove or countervail the presumption.

As the court said in *Price v. United States* (1914), 218 Fed. 149, 153-154, in the Circuit Court of Appeals for the Eighth Circuit:

The State may rebut the presumption of innocence; all its evidence is leveled directly at that presumption. But against this so-called presumption of good character the State is powerless. It may not meet it by evidence, argument, or instruction from the bench; for, until the defendant has first introduced evidence on the subject of his character, the State may not enter that field. The presumption, if it is allowed at all, must be a conclusive presumption, because it can not be rebutted by evidence. Thus in our courts the basest character would be placed in a better position than the most upright; for the latter will usually be shown by evidence, and may be met by counter evidence, while the former will be made whiter than snow by the simple alchemy of presumption. To allow such a presumption would be as unjust to society as the denial of the correct rule of law would be to the defendant. If the presumption exists, counsel have a right to use it in argument, and to require its declaration from the bench. What will be the effect upon juries? When they are told by the court that the presumption exists, and that they must give effect to it in their decision, they are bound to conclude that this means something, though they have no way of knowing what weight they ought to

attach to this peculiar "evidence," which has no basis either in testimony or in inference. It would be a poor advocate, indeed, who could not raise a "reasonable doubt" out of such metaphysics. Sound legal administration—an administration that is just to society as well as the defendant—forbids the allowance of any such presumption. When the defendant is given the benefit of the presumption of innocence, and the rule in regard to reasonable doubt, and is protected against any attack upon his past life, either by evidence, argument, or instruction, he is fully protected against injustice. To go farther is, in the language of Mr. Justice Brewer (in an article in the *North American Review*), "not to protect the innocent, but to make it impossible to convict the guilty."

See also *Chambliss v. U. S.*, 218 Fed. 154, 161.

The existence of a presumption such as the appellant contends for might place a defendant who introduced no evidence of character in a better position than a defendant who introduced evidence and failed to prove it. As was said in *United States v. Smith* (1914), 217 Fed. 839, 840, in the District Court for the Eastern District of Pennsylvania:

If the presumption must stand unchallenged, then theoretically a defendant of a character so bad that he dare not put it in issue stands higher than the one who offers evidence of a good character, and as high as one who proves good character. A like practical dilemma discovers itself. The trial judge in a proper case should certainly be free to make clear to the jury the distinction between good character, as proven, and the presumption of innocence,

both of which alike inure to the benefit of the defendant. It would be a delicate undertaking to attempt to distinguish between good character proven and good character presumed as a fact, without presenting to the jury the suggestion that in the latter case good character had not been proven. The attempt would probably be futile.

The same point of view is presented in a strong recent opinion of the New York Court of Appeals (*People v. Lingley* (1913), 207 N. Y. 396, 406):

This prohibition against any attempt to blacken the general character of the accused unless he opens the door by seeking to establish the excellence of that character is tantamount to a rule that the general character of the defendant in a criminal case, although relevant, may not be made an issue unless the defendant chooses to make it so. If, in addition to this adequate protection against the possibility of undue prejudice, the defendant is also shielded by an unassailable presumption of general good character, the prosecution may be placed in a position of unwarrantable disadvantage. The defendant in every criminal trial will be entitled to have the jury instructed that the law presumes his general character to be good; while the prosecution can not appeal to any evidence to overcome this presumption if the defendant has introduced none to support it. In other words, the accused may always have the benefit of a very influential presumption which he can invariably prevent the prosecution from rebutting at his own will.

To hold that this alleged presumption of general good character exists would be to give an unfair advantage to the defendant, uncalled for by any considerations of justice or even extreme solicitude on account of the difficulties which sometimes beset an accused person in establishing his defense.

The true doctrine, as it seems to me, is that there is no presumption, one way or the other, upon the question whether the general character of the accused is good or bad. As is well said by Prof. Wigmore, *supra*, "the defendant's character is simply a nonexistent quantity in the evidence." While nothing is to be taken against the defendant by reason of the non-introduction of evidence on his part to establish his good character, there is no rule, such as the presumption contended for would create, which compels the jury to conclude that his character is good in the absence of any proof on the subject. Under such circumstances the law does not presume anything about it.

So, in *People v. Johnson* (1882), 61 Cal. 142, Judge McKinstry in a concurring opinion said:

If, in the absence of evidence on the subject, the presumption of good character is to weigh as much in his favor as affirmative proof of it, the necessity of proving good character would never arise; and the prosecution would frequently be in a worse case than if evidence of good character had been given—since the prosecution would be debarred from introducing evidence to overcome the *presumption*.

Wigmore deals with the question as follows (Evidence, Vol. I, sec. 290):

By general concession, the accused's failure to produce testimony to his good character is not open to the inference that the character is bad, since otherwise the rule would be evaded that the prosecution can not invoke and prove his bad character until he offers to prove his character good.

And Wigmore adds in a note to this section:

But note that it is incorrect to say (as in *Mullen v. United States*, 46 C. C. A., 22, 106 Fed. 892 (1901), 1901), that the accused's good character is presumed; this inconsistently gives him the untrammelled benefit of evidence which if he had introduced might have been disputed. What really happens, or ought to, is that the defendant's character is simply a non-existent quantity in the evidence; this distinction has sometimes been expressly pointed out. 1901, *Addison v. People*, 193 Ill. 405, 62 N. E., 235; 1880, *Knight v. State*, 70 Ind. 380.

An excellent statement of the doctrine for which the Government contends is found in *Addison v. People* (1901), 193 Ill. 405.

(3) Even if there should be a presumption of good character on which the defendant should be entitled to have the jury instructed, it is clear that the defendant would not have been entitled to the specific instructions asked for in this case, without further explanation and limitation.

For if good character may be availed of by the defendant in the form of a presumption, he certainly can not avail himself of any different form of good character than that of which he may introduce evidential proof.

But it is not good character in general or all kinds of good character which the defendant is entitled to prove by evidence. The good character which he seeks to put in evidence by testimony as to common reputation must "involve the specific trait related to the act charged" (Wigmore's Evidence, Vol. I, sec. 59). The proof must be of reputation for traits of good character with respect to the nature of the charge or to the species of crime charged.

Since, therefore, the trial court may not allow a defendant to introduce evidence of every form of good character, but must confine the proof within limited boundaries, so the court clearly may not instruct a jury broadly that "the defendant is presumed to be a person of good character," without explaining to the jury that the good character so presumed is simply his traits of character bearing upon the nature of the crime charged.

(4) The full extent to which any rule of law gives to a defendant the protection of a presumption of good character is as follows: "The uncontrollable and unfair prejudice and possible unjust condemnation" which would attend the introduction of evidence of a defendant's bad character by the prosecution has given rise to the rule of law that, although such evidence might well be probative and relevant,

it nevertheless may not be introduced by the prosecution unless and until the defendant has first introduced evidence on the subject of his character (Wigmore, Evidence, Vol. I, secs. 57, 58). As a corollary to this rule of law, grounded purely on public policy and not on any doubt as to relevancy, the courts have established a further rule of law to the effect that the defendant's omission to introduce testimony as to his good character shall not open or create any inference, assumption, or presumption that his character is bad, and hence that neither the prosecutor nor the trial judge may argue to the jury, comment, or advert upon such omission.

This is very well and precisely stated in Bishop's New Criminal Procedure (Vol. I, sec. 1119):

Because the State may not show a character bad which the defendant has not put in issue, the omission of this evidence does not justify the presumption that it is not good; and neither counsel nor judge has the right to argue to the jury that it does, nor should they assume anything against it while deliberating on their verdict.

But this rule does not constitute an affirmative presumption of good character. In fact, it is not a presumption at all, in the strict sense. It is simply a rule of law as to the right of the prosecution or of the trial judge to comment on a defendant's failure to introduce evidence as to his character. It is no more a presumption than is the rule (to which it is a supplement) to the effect that the prosecution may not

introduce character evidence except in rebuttal of evidence introduced of character by the defendant.

As the court said in the *Price case*, *supra* (p. 151):

To say that the defendant's character shall not be attacked unless he himself puts it in issue is manifestly a very different thing from saying that his character is presumed to be good.

The two propositions are nevertheless erroneously assumed to be mutually equivalent by the textbook writers cited by the appellant on his brief, and in the cases cited both by the textbook writers and by the appellant (with the few exceptions specifically considered on the Government's brief, *infra*).

In most of the cases cited, the only question actually involved was whether error had been committed by comments or arguments of the prosecution or by comments or instructions of the trial judge on the legal effect of the omission of the defendant to introduce evidence as to his character.

In such cases, the courts have correctly laid down the rule of law that the district attorney or the judge may not make such comment, and that the jury may not draw any inference of bad character from the failure of the defendant to prove his good character. It is only in such sense and in such a connection that there exists any rule of law to the effect that a defendant's character is presumed to be good.

In other words, the rule of law simply goes to the extent of negating the existence of presumption of

bad character, but does not establish an affirmative presumption of good character. In stating the presumption affirmatively, the courts have merely set forth an abstract proposition which had no practical application to the facts before them.

In the comparatively few cases, however, where there has been no such improper comment, and where the sole point involved is: "When the defendant introduces no character evidence, is he entitled to the bald, unexplained instruction that 'the defendant is presumed to be a person of good character?'" the weight of authority is to the effect that the question of character is wholly outside the case, and that there is no presumption in regard to the defendant's character being either good or bad, his general character not in any way being an issue unless the defendant chooses to make it an issue by introducing evidence in support of it. As is stated in an able note in 46 L. R. A., new series, page 343:

This view gives defendant full benefit of the presumption of innocence and every other safeguard belonging to the accused whereby he is protected against prejudice resulting from the accusation, since it permits no unfavorable deduction to be made from the failure to offer testimony. As pointed out in Wigmore on Evidence, section 290, note, 2, \* \* \* it would be illogical to presume the defendant's character good, since to do so would be to give him the benefit of evidence that he could probably not have produced, and that without the risk of the counter evidence by the prosecu-

tion. Under such a view a deferdant would always be in a better position to rely on the presumption than to offer evidence.

#### IV,

**The State court cases cited by the appellant do not support his contention.**

The whole doctrine as to the alleged right of a defendant to have the jury instructed that there exists in his favor a presumption of good character seems to have arisen from the wrenching of one phrase in *People v. Bodine*, 1 Denio (N. Y.), 281, 314, in 1845, out of the connection in which it was used. In that case the court said:

The remarks of the judge upon the subject of general character are in the main correct, though I think he erred in the stress laid on the absence of good character. He seems in effect to have advised the jury that, as the prisoner, who alone could make the question, gave no evidence that her general character was good, this authorized an inference that it was positively bad. This presented a question for the jury which I think was not properly before them. Where no proof of general character is given the law assumes that it is of ordinary fairness and respectability. A prisoner on trial may show what his reputation is, and then it is open to the prosecution to determine like other controverted facts. But if the prisoner chooses to give no evidence on the subject, the jury are not at liberty to conjecture that his character is bad in order

to infer that he is guilty of the particular crime charged. Good character is a shield which the prisoner may use if he has it, but if he is intent to leave his character entirely out of the case, the jury are not thence to infer that it is bad. Under such circumstances the general character of the defendant is hardly a subject to be considered by the jury, and they should determine the guilt or innocence of the accused upon the evidence before them and wholly irrespective of the question of general character.

The foregoing seems to be a most illuminating presentment of the underlying principles relating to this alleged "presumption," which after all is but a precautionary rule of law established by the courts, lest for failure to introduce evidence of good character the defendant may be prejudiced in the eyes of the jury. The phrase "where no proof of general character is given, the law assumes that it is of ordinary fairness and respectability," has to be taken in connection with the question before the court, and can not properly be held to be a ruling that in all criminal cases the defendant is entitled to an instruction that a presumption of good character exists in his favor.

The *Bodine* case was followed in 1850 in New York by *Ackley v. People*, 9 Barb. 610, in which the trial judge's charge that absence of such proof of good character was to be taken into account against the defendant was held to be reversible error. The court repeated the expression in the *Bodine*

case that "where no proof of general character is given the law assumes that it is of ordinary fairness"; but at the same time the court ruled that if the trial judge had "simply declined charging as requested by prisoner's counsel, there would have been no error." It is to be noted that the prisoner's counsel had requested the court to charge that inasmuch as no evidence had been given of the general character of the defendant, the law would presume it of ordinary fairness, etc. In stating that in a refusal to give this instruction "there would have been no error," the New York court held precisely what the Circuit Court of Appeals has held in the case at bar.

Nevertheless, it is chiefly on the basis of these two New York cases that the whole doctrine as to the existence of a presumption of good character has been built in the American State court cases.

The expression as to the law assuming a defendant's character to be of ordinary fairness was repeated in a Maine case in 1854 (*Maine v. Upham*, 38 Me. 261), in which the actual question and point involved was simply that where no evidence of good character is given, no legal inference can arise from such omission that he is guilty of the offense or that his character is bad, nor will such omission authorize an argument to the jury against his general good character.

Careful scrutiny of the State court cases will show that the questions actually involved in them were as set forth in the classification made on pages 7-10 of this brief.

The Federal court cases cited by appellant do not, when analyzed, fully support his contention.

The first case in which the topic was discussed in the Federal courts arose in the Circuit Court of Appeals for the Sixth Circuit (Taft, Lurton, and Day, Circuit Judges), *McKnight v. United States* (1899), 97 Fed. 208, 211, in which the judge instructed the jury as follows:

The law presumes the defendant innocent until he has been proven guilty to the exclusion of a reasonable doubt. The law presumes his character to be good; *but as the defendant might introduce evidence as to the fact of his good character, and did not, I think the district attorney can comment upon the fact that he had not.* [Italics ours.]

That part of the instruction in italics was held by the Circuit Court of Appeals to constitute reversible error, saying in this connection, and citing the above extract from Bishop as authority:

(P. 210:) It will thus be perceived that while the court recognized the well-established rule that, in the absence of testimony, the law presumes the accused to possess a good character, it nevertheless permitted the counsel for the Government to comment upon the want of such testimony.

(P. 211:) Where no testimony is offered, the accused can rest upon the legal presumption of good character. The question in this case is: May he be required to rest upon that

presumption, qualified by the argument of the prosecuting attorney, made with the approval of the court, urging the jury to consider that the accused could have introduced testimony, had he been able to do so, showing his good character? To permit such course of proceeding would be to deprive the accused of the legal presumption in his favor. The suggestion of counsel, thus approved by the court, may be more detrimental to the rights of the accused than any testimony which could be adduced against him. In effect, it not only destroys the presumption in his behalf, but permits an inference that his character is bad because he has not produced proof to the contrary.

Two years later, however, the Circuit Court of Appeals for the Sixth Circuit (Lurton, Day, Sevens, Circuit Judges) in *Mullen v. United States* (1901), 106 Fed. 892, gave a decision some expressions used in which give color to the present appellant's contention. Careful scrutiny of the case shows that the lower court was actually reversed because of the prejudicial comments of the judge, and not simply because he failed to give a correct instruction. The situation in the lower court, as stated by the Court of Appeals, was as follows (p. 893):

Counsel for plaintiffs in error, at the conclusion of the charge, said: "If your honor please, we offered your honor an instruction that the defendants were presumed to be persons of good character, and that that presumption prevailed during the progress of the

case." To which the court responded: "I do not think that the jury should be told that the defendants are presumed to be persons of good character, but they are presumed, as the court has told the jury, whether of good character or bad character, to be innocent until their guilt has been established as to the exclusion of a reasonable doubt by testimony." An exception was taken to the court's ruling in declining to instruct the jury as to the good character of the accused, and, before the jury retired, the defendants, and each of them, moved the court to instruct the jury as follows: "You are charged that the law presumes the good character of the accused, and such presumption is to be considered as evidence in favor of the accused in considering the question of the guilt or innocence of them, or any of them." But the court refused to so instruct the jury, to which ruling of the court each of the said defendants then excepted.

The Court of Appeals held these rulings to constitute reversible error, and held that the defendant was entitled to an instruction as to the existence of a presumption of good character, saying (p. 894):

This presumption to the extent to which it exists, though less important, is as much his right in a criminal trial as the presumption in favor of his innocence.

The only authorities on which the court based this decision were the *Coffin* case in the Supreme Court, Bishop's New Criminal Procedure, Underhill's Criminal Evidence, and the McKnight case in the Sixth Circuit.

It is to be noted, however, (1) that the Coffin case did not in any way deal with or refer to a presumption of good character; (2) that the passage cited from Bishop, section 1112, paragraph 2, to the effect that "the doctrine is that the defendant is presumed to be innocent and his character to be at least of ordinary goodness," is qualified, as to character, by the more precise statement made by Bishop in his same work, Section 1119, cited *supra*; (3) that the passage from Underhill, when read as a whole, simply reiterates the actual decision in the *McKnight case*, viz, that no presumption of guilt arises from failure of the defendant to offer evidence as to his character, that bad character can never be presumed, and that the State may not comment unfavorably on an omission of a defendant to introduce evidence as to character.

The actual decision in the *Mullen case* was undoubtedly influenced by the fact that the judge in the lower court made further comments as to the defendant's character which might have reacted unfavorably on the defendants in the minds of the jury, for instance he said (p. 893):

Now, it is a fact that can not escape your attention—could not probably escape your attention—that, if these defendants desired, or anybody behind them desired, to have colored men deprived of the right of voting, that it would be at such a precinct as this; and it is not improbable that just such men as these defendants would be chosen to carry that object into execution. Those are cir-

cumstances that you might weigh in this case in reaching a conclusion.

These comments alone possibly might have justified the court in granting a new trial. Careful consideration of the case, and especially of the authorities cited by the court on page 895 of its opinion, relative to the right of the judge to comment or express an opinion on the evidence, shows that the court was greatly influenced in its decision by the general remarks made by the judge to the jury; and in *Fields v. United States* (1906), 27 App. D. C., 433, 449 Chief Justice Shepard, in deciding that no presumption of good character existed, stated that the *Mullen case* was decided on the ground that "the court in refusing the instruction, made remarks decidedly prejudicial to the defendant respecting his failure to offer similar proof."

It is submitted that if the judge had instructed the jury, as he did, that "the defendants whether of good character or bad character are presumed to be innocent until their guilt has been established to the exclusion of a reasonable doubt by testimony," and if he had made no further comments, such an instruction would have been accurate and valid, and that the defendants would not have been entitled to the further instruction asked for by him, viz, "that the law presumes the good character of the accused and such presumption is to be considered as evidence in favor of the accused in considering the question of the guilt or innocence of them or any of them."

The case of *Lowden v. United States* (1906), 149 Fed. 673, 677, in the Circuit Court of Appeals for the Fifth Circuit, cited by the appellant, is not an authority for the appellant's contention. It simply decided the point that where the defendant offered no evidence to prove good character, it was error for the court to allow the United States attorney to argue to the jury that they might presume that the defendant's character was bad because he failed to offer evidence that it was good.

The court correctly held, in accordance with the undisputed weight of authority, that failure to offer such evidence does not create a presumption that defendant's character was bad.

Incidentally, the court said (p. 677) (citing the *Mullen case*) that defendant "unquestionably had the right to rely on the legal presumption that his character was good;" but this remark must be taken as accurate only in connection with the point actually before the court. The case is not an authority for the bald, unexplained proposition that when no improper comment on defendant's failure to present character evidence is involved, the defendant is, as a matter of law, entitled to an instruction by the judge that there exists in his favor a presumption of good character.

The next case cited by appellant is *United States v. Guthrie* (1909), 171 Fed. 528, arising in the District Court for the Southern District of Ohio (in the Sixth Circuit), in which Judge Sater charged the jury as follows (p. 532):

There is also in his favor a presumption of good character. This presumption also runs in his favor throughout the case until removed by evidence of the character mentioned. *He was not required to call any witnesses as to his general good character, and his failure to do so raises no presumption or inference that it was bad.* [Italics ours.]

The last sentence undoubtedly correctly states the law. The first two sentences clearly do not state a correct legal proposition.

The next case cited by appellant is *Garst v. United States* (1910), 180 Fed. 339, 344, 345, in which the Circuit Court of Appeals for the Fourth Circuit held as follows:

This assignment of error further complains of the action of the court in relation to the third instruction offered by the defendant below, which was offered as follows:

"The court instructs the jury that the previous good character of the defendants ought to be considered together with all the other facts in evidence, in passing upon the question of their guilt or innocence of the charge, *for the law presumes that a man whose character is good, is less likely to commit a crime than one whose character is not good.*"

The court struck out the words above italicized in the instruction, and gave the remainder of it and this was assigned as error. We think there is no merit in this assignment of error for several reasons: The clause stricken out institutes a comparison between a man

whose character has been proved good and one whose character is not good. There is no warrant for an instruction based upon such comparison, because the law presumes that every defendant's character is good, and the sole effect of evidence introduced by him tending to affirmatively show good character is to strengthen the presumption of innocence which already exists in his favor by virtue of this presumption of law. The Government is not allowed to show as a part of its case that any defendant's character is not good; and therefore, in our judgment, there is no warrant whatever for instituting in an instruction a comparison between the character of a man who has presented evidence tending to show that his character is good and a man whose character is not good.

It would undoubtedly have been correct to ask the court to instruct the jury that evidence of good character is proper to be considered by the jury as strengthening the presumption of innocence which exists in his favor, but we are clear that the court can never be required to institute a comparison.

This case is no authority for the proposition that the defendant is entitled to an instruction of the existence of a presumption of good character, when no evidence of character has been introduced by him and when neither the judge nor United States Attorney has in any way commented adversely on his character or his failure to produce character evidence.

## VI.

The textbook writers cited by the appellant in support of his contention of the existence of a presumption of good character sustain his contention only by loose statements; but the cases cited by the textbook writers only support the text to the extent set forth in this brief *supra*. The texts as to this subject are to be received with caution and their foundation carefully inspected.

Encyclopedia of Evidence (1906), Volume III, page 34; Volume IX, page 927:

The law presumes the good character of a person accused of crime, and no inference of bad character arises from his failure to offer evidence of good character.

In some jurisdictions, however, it is held that in the absence of evidence there is no presumption one way or the other as to the character of a defendant in a criminal prosecution.

The cases cited, however, in support of the text (with the exception of the few cases specifically considered *supra*), go no further than to lay down the proposition that under certain circumstances the defendant is entitled to have the jury instructed that no presumption of bad character exists in the absence of any proof introduced by him as to good character. All these cases are included in Class C and Class D on pp. 8 to 10 of this brief. The same comment may be made as to the authorities cited to support the statements in Wharton's Criminal Evidence (10th ed.), sec. 57; Rice on Evidence (1893), Vol. III, p. 597; Underhill on Criminal Evidence (1910, 2d ed.), sec. 76;

Bishop's New Criminal Procedure (2d ed., 1913), Vol. II, sec. 1112; Jones's Commentaries on Evidence (1913), Vol. I, sec. 148a.

## VII.

**A presumption of good character, even if there be such a presumption known to the law, is not evidence for the defendant, and an instruction that it constitutes such evidence is not warranted on proper legal principles.**

The doctrine urged by the appellant that the alleged presumption of good character may be regarded as evidence for the defendant is based on an expression used by this Court in *Coffin v. United States* (1895), 156 U. S. 432, in which, referring to the presumption of innocence, it was said (p. 460): "It is evidence in favor of the accused."

The actual decision in the *Coffin* case to the effect that the defendant was entitled to a specific instruction as to the continued existence of the presumption of innocence throughout the case, has been reaffirmed in many later cases. *Cochran and Sayre v. United States* (1895), 157 U. S. 286, 299; *Davis v. United States* (1895), 160 U. S. 469, 485-486; *Allen v. United States* (1896), 164 U. S. 492, 500; *Kirby v. United States* (1899), 174 U. S. 47, 55.

The particular phrase above quoted that the presumption "is evidence in favor of the accused," seems to have been somewhat modified by later cases in this court. Thus in *Agnew v. United States* (1897), 165 U. S. 36, 51, 52, the court said:

That the court erred in giving to the jury the following instruction: "The defendant is presumed to be innocent of all the charges against him until he is proven guilty by the evidence submitted to you. This presumption remains with the defendant until such time in the progress of the case that you are satisfied of the guilt beyond a reasonable doubt," and in not giving the following instruction asked by defendant: "Every man is presumed to be innocent until he is proved guilty, and this legal presumption of innocence is to be regarded by the jury in this case as matter of evidence to the benefit of which the party is entitled. This presumption is to be treated by you as evidence giving rise to resulting proof to the full extent of its legal efficacy."

The court is not bound to accept the language which counsel employ in framing instructions, nor is it bound to repeat instructions already given in different language.

But in that case (the *Coffin case*) the charge of the court was thought not to have given due effect to the presumption of innocence, which there was no failure in this case to state, and the giving of the instruction asked would have tended to obscure what had already been made plain.

It would appear that the court in thus deciding held that the second sentence of the requested instruction, viz, "This presumption is to be treated by you as evidence giving rise to resulting proof to the full extent of its legal efficacy," was unnecessary

if the general correct instruction as to presumption of innocence were given.

In *Holt v. United States* (1910), 218 U. S. 245, 253, the court said:

Another exception was to the refusal to give an instruction that "the presumption of innocence starts with the charge at the beginning of the trial, and goes with (the accused) until the termination of the case. This presumption of innocence is evidence in the defendant's favor," etc. The judge said: "The law presumes innocence in all criminal prosecutions. We begin with a legal presumption that the defendant, although accused, is an innocent man. Not that we take that to be an absolute rule, but it is the principle upon which prosecutions must be conducted; that the evidence must overcome the legal presumption of innocence. And in order to overcome the legal presumption, as I have already stated, the evidence must be clear and convincing and sufficiently strong to convince the jury beyond a reasonable doubt that the defendant is guilty," with more to the same effect. This was correct, and avoided a tendency in the closing sentence quoted from the request to mislead. (*Agnew v. United States*, 165 U. S. 36, 51, 52. See also 4 Wigmore, Evidence, sec. 2511.)

It would appear that the court expressly stated that an instruction that "This presumption of innocence is evidence in the defendant's favor" had a tendency to mislead.

So, also, when the *Coffin* case came before the court a second time (*Coffin v. United States* (1896), 162 U. S. 664), an instruction on the presumption of innocence which omitted any statement as to the presumption constituting evidence for the defendant was passed by the court without comment or dissent.

It may further be noted that the court in the first *Coffin* case (p. 459) approved of the views set forth in "a careful article in the Criminal Law Magazine for January, 1889 (Vol. II)," which stated that "This presumption is *in the nature of evidence* in his favor (i. e., in favor of the accused), and a knowledge of it should be communicated to the jury." There is, however, considerable difference between stating that a presumption is "in the nature of evidence" and stating that it is actually evidence.

The doctrine that the presumption of innocence constitutes actually evidence for the defendant has been vigorously opposed by Prof. James Bradley Thayer in his Preliminary Treatise on Evidence (1898), Appendix B, pages 550 et seq. (See also Thayer's article in Yale Law Journal, Vol. III.) It is also opposed in Chamberlayne's Treatise on the Modern Law of Evidence, Volume II, section 1176d; and in Wigmore's Treatise on the System of Evidence in Trials at Common Law (1905), Volume IV, section 2511, as follows;

As to the second fallacy, it seems to have been mainly propagated by the passage of Professor Greenleaf, declaring that "this legal presumption of innocence is to be regarded by

the jury, in every case, as *matter of evidence*, to the benefit of which the party is entitled." But it can not be regarded as "matter of evidence." No presumption can be evidence; it is a rule about the duty of producing evidence. This is, in itself, only a matter of the theory of presumptions, and to that extent may be regarded as a mere question of words—of the way of phrasing a rule upon the substance of which there is no dispute. But when this erroneous theory is made the ground for ordering new trials because of the mere wording of a judge's instruction to a jury, the erroneous theory is capable of causing serious harm to the administration of justice.

It would seem, therefore, that while the decision in the *Coffin case* was undoubtedly correct and is now the established doctrine of this Court, the expression used as to the presumption constituting evidence in favor of the defendant is not to be regarded as a precise statement of law which the defendant is entitled to have given as an instruction. As Thayer said (pp. 575, 576):

What appears to be true may be stated thus:

1. A presumption operates to relieve the party in whose favor it works from going forward in argument or evidence.
2. It serves, therefore, the purposes of a *prima facie* case, and in that sense it is, temporarily, the substitute or equivalent for evidence.
3. It serves this purpose until the adversary has gone forward with his evidence. How

much evidence shall be required from the adversary to meet the presumption, or, as it is variously expressed, to overcome it or destroy it, is determined by no fixed rule. It may be merely enough to make it reasonable to require the other side to answer; it may be enough to make out a full *prima facie* case; and it may be a great weight of evidence, excluding all reasonable doubt.

4. A mere presumption involves no rule as to the weight of evidence necessary to meet it. When a presumption is called a strong one, like the presumption of legitimacy, it means that it is accompanied by another rule relating to the weight of evidence to be brought in by him against whom it operates.

5. A presumption itself constitutes no evidence, and has no probative quality. It is sometimes said that the presumption will tip the scale when the evidence is balanced. But, in truth, nothing tips the scale but evidence, and a presumption—being a legal rule or a legal conclusion—is not evidence. It may represent and spring from certain evidential facts; and these facts may be put in the scale. But that is not putting in the presumption itself. A presumption may be called “an instrument of proof,” in the sense that it determines from whom evidence shall come, and it may be called something “in the nature of evidence,” for the same reason; or it may be called a substitute for evidence, and even “evidence”—in the sense that it counts at the outset, for evidence enough to make a *prima facie* case. But the moment these

conceptions give way to the perfectly distinct notion of evidence proper, i. e., probative matter, which may be a basis of inference, something capable of being weighed in the scales of reason and compared and estimated with other matter of the probative sort, so that we get to treating the presumption of innocence or any other presumption as being evidence in this its true sense, then we have wandered into the regions of shadows and phantoms.

**CONCLUSION.**

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted.

CHARLES WARREN,  
*Assistant Attorney General.*

JANUARY, 1918.

○

Opinion of the Court.

## GREER v. UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE  
EIGHTH CIRCUIT.

No. 504. Argued January 18, 1918.—Decided January 28, 1918.

There is no presumption in a criminal case that the accused is of good character.

A presumption upon a matter of fact, when it is not merely a disguise for another principle, means that common experience shows the fact to be so generally true that courts may notice the truth.

The District Court in a criminal trial is not bound by the rules of evidence as they stood in 1789. *Rosen v. United States*, ante, 467. 240 Fed. Rep. 320, affirmed.

THE case is stated in the opinion.

*Mr. James C. Denton*, with whom *Mr. Frank Lee* was on the brief, for petitioner.

*Mr. Assistant Attorney General Warren*, for the United States, submitted.

MR. JUSTICE HOLMES delivered the opinion of the court.

The petitioner was tried for introducing whiskey from without the State into that part of Oklahoma that formerly was within the Indian Territory. He was convicted and sentenced to fine and imprisonment. Material error at the trial is alleged because the court refused to instruct the jury that the defendant was presumed to be a person of good character, and that the supposed presumption should be considered as evidence in favor of the accused, with some further amplifications not necessary to be repeated. The court did instruct the jury that the de-

fendant was presumed to be innocent of the charge until his guilt was established beyond a reasonable doubt, and that the presumption followed him throughout the trial until so overcome. The Circuit Court of Appeals sustained the court below. 240 Fed. Rep. 320. 153 C. C. A. 246. This judgment was in accordance with a carefully reasoned earlier decision in the same circuit, *Price v. United States*, 218 Fed. Rep. 149; 132 C. C. A. 1, with an acute statement in *United States v. Smith*, 217 Fed. Rep. 839, and with numerous state cases and text books. But as other Circuit Courts of Appeal had taken a different view, *Mullen v. United States*, 106 Fed. Rep. 892, 46 C. C. A. 22; *Garst v. United States*, 180 Fed. Rep. 339, 344, 345, 103 C. C. A. 469, also taken by other cases and text books, it becomes necessary for this court to settle the doubt.

Obviously the character of the defendant was a matter of fact, which, if investigated, might turn out either way. It is not established as matter of law that all persons indicted are men of good character. If it were a fact regarded as necessarily material to the main issues it would be itself issuable; and the Government would be entitled to put in evidence whether the prisoner did so or not. As the Government cannot put in evidence except to answer evidence introduced by the defence the natural inference is that the prisoner is allowed to try to prove a good character for what it may be worth, but that the choice whether to raise that issue rests with him. The rule that if he prefers not to go into the matter the Government cannot argue from it would be meaningless if there were a presumption in his favor that could not be attacked. For the failure to put on witnesses, instead of suggesting unfavorable comment, would only show the astuteness of the prisoner's counsel. The meaning must be that character is not an issue in the case unless the prisoner chooses to make it one; otherwise he would be foolish to open the

559.

Dissent.

door to contradiction by going into evidence when without it good character would be incontrovertibly presumed. *Addison v. People*, 193 Illinois, 405, 419.

Our reasoning is confirmed by the fact that the right to introduce evidence of good character seems formerly to have been regarded as a favor to prisoners, *MacNally, Evidence*, 320, which sufficiently implies that good character was not presumed. In reason it should not be. A presumption upon a matter of fact, when it is not merely a disguise for some other principle, means that common experience shows the fact to be so generally true that courts may notice the truth. Whatever the scope of the presumption that a man is innocent of the specific crime charged, it cannot be said that by common experience the character of most people indicted by a grand jury is good.

It is argued that the court was bound by the rules of evidence as they stood in 1789. That those rules would not be conclusive is sufficiently shown by *Rosen v. United States, ante*, 467. But it is safe to believe that the supposed presumption is of later date, of American origin, and comes from overlooking the distinction between this and the presumption of innocence and from other causes not necessary to detail.

*Judgment affirmed.*

MR. JUSTICE MCKENNA dissents.